No. 11-192

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES X. BORMES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Little Tucker Act, 28 U.S.C. 1346(a)(2), waives the sovereign immunity of the United States with respect to damages actions for violations of the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Statutes:

Statutes—Continued: Page

Statutes—Continued: Page

Miscellaneous: Page

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 626 F.3d 574. The court of appeals' denial of the government's motion to transfer the appeal to the Seventh Circuit (App., *infra*, 18a-22a) is not published in the Federal Reporter, but is available at 2010 WL 331771. The opinion of the district court (App., *infra*, 23a-30a) is reported at 638 F. Supp. 2d 958.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 2010. A petition for rehearing was denied

on March 15, 2011 (App., *infra*, 31a-32a). On June 3, 2011, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 13, 2011. On July 1, 2011, the Chief Justice further extended the time to August 12, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Little Tucker Act, 28 U.S.C. 1346(a)(2), provides, subject to certain exceptions not relevant here:

> The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of * * * [a]ny * * * civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

The general Tucker Act, 28 U.S.C. 1491(a)(1), provides in relevant part:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

Relevant provisions of the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, are reproduced in the appendix to this petition. App., *infra*, 33a-79a.

STATEMENT

1. Respondent is an attorney who, according to the allegations in his complaint, filed a lawsuit on behalf of one of his clients in the United States District Court for the Northern District of Illinois in August 2008. App., *infra*, 86a. He paid the $350 filing fee with his own American Express credit card. *Ibid.* The transaction was processed through the federal government's pay.gov system, which dozens of federal agencies use to process online credit- and debit-card payment transactions. *Id.* at 85a-86a. Respondent alleges that he received from this government website a "confirmation webpage that was displayed on his computer screen," as well as an e-mail confirmation, both of which contained the expiration date of his credit card. *Id.* at 87a.

Respondent then filed this putative class action, also in the United States District Court for the Northern District of Illinois, alleging that the government's electronic transaction confirmations did not comply with the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681, *et seq.* App., *infra*, 2a. FCRA is a consumer-protection statute that regulates the collection, dissemination, and use of information related to a consumer's finances and creditworthiness. See *TRW, Inc.* v. *Andrews*, 534 U.S. 19, 23 (2001). One of FCRA's substantive provisions, added in 2003, prohibits a "person" that "accepts credit cards or debit cards for the transaction of business" from "print[ing] more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction." 15 U.S.C. 1681c(g)(1); see Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1959. Respondent claimed that the government had violated that provision; that it had done so "willfully"; and

that, as a result, he and a class of thousands of similarly situated persons were entitled to recovery under 15 U.S.C. 1681n (2006 & Supp. III 2009). App., *infra*, 91a-97a. Section 1681n provides, as relevant here, that "[a]ny person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer" for statutory damages of $100 or actual damages of up to $1000, potential punitive damages, and attorney fees and costs. 15 U.S.C. 1681n(a).

The district court dismissed the suit. App., *infra*, 23a-30a. The court explained that "[t]he well-established doctrine of sovereign immunity protects the United States from suit except where Congress has 'unequivocally expressed' a waiver of immunity." *Id.* at 27a-28a (quoting *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 33-34 (1992)). Respondent pointed to FCRA's general definition of "person" as "any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity," 15 U.S.C. 1681a(b), and argued that Section 1681n's imposition of damages liability on any "person" necessarily included the United States. App., *infra*, 28a. The district court disagreed, observing that "other federal statutes have unequivocally waived the United States' sovereign immunity by expressly inserting the specific term 'United States' into the statutory language." *Ibid.*; see *id.* at 28a-29a (citing the Federal Tort Claims Act, 28 U.S.C. 1346(b)(1), and the Quiet Title Act, 28 U.S.C. 2409a(a)). The district court further observed that "a separate section of the FCRA expressly provides that the United States may be liable for certain violations." *Id.* at 29a; see 15 U.S.C. 1681u(i) (imposing liability on "[a]ny agency or department of the

United States" for certain actions relating to law-enforcement investigations). The district court concluded that Section 1681n, by contrast, "has not so unequivocally waived the sovereign immunity of the United States." App., *infra*, 29a.

2. Respondent appealed to the Federal Circuit. App., *infra*, 19a. His asserted justification for appealing to the Federal Circuit, rather than the regional Seventh Circuit, was 28 U.S.C. 1295(a)(2). App., *infra*, 92a. Under that provision, the Federal Circuit has exclusive jurisdiction "of an appeal from a final decision of a district court of the United States * * * if the jurisdiction of that court was based, in whole or in part, on" the Little Tucker Act, 28 U.S.C. 1346(a)(2).

In the district court, respondent's complaint had alleged multiple bases of jurisdiction over his suit. App., *infra*, 82a. One was FCRA's own jurisdictional provision, 15 U.S.C. 1681p, which provides that "[a]n action to enforce any liability created under this subchapter may be brought in any appropriate United States district court, without regard to the amount in controversy, or in any other court of competent jurisdiction." Another asserted basis of jurisdiction was the Little Tucker Act, which provides that, subject to certain exceptions, "district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims," of a "civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. 1346(a)(2). The Little Tucker Act is an adjunct to the general Tucker Act, 28 U.S.C. 1491(a)(1), which

provides that the same set of claims may be brought in the United States Court of Federal Claims, whether or not the plaintiff seeks more than $10,000. See, *e.g.*, *United States* v. *Sherwood*, 312 U.S. 584, 591 (1941) (substantive scope of Little Tucker Act and Tucker Act are identical). The district court had not resolved the question whether the Little Tucker Act can provide the basis for jurisdiction over a FCRA suit. App., *infra*, 26a n.1; see *id.* at 3a.

The government moved to transfer respondent's appeal to the Seventh Circuit. App., *infra*, 19a. The government argued that, to the extent a FCRA suit against the United States would be permissible at all, the proper jurisdictional basis would be FCRA's own specific jurisdictional provision, 15 U.S.C. 1681p, and not the more general jurisdictional provision in the Little Tucker Act. App., *infra*, 20a-21a. The relevant statute governing an appeal therefore would not be 28 U.S.C. 1295(a)(2), but instead 28 U.S.C. 1291, which would assign the appeal to the appropriate regional circuit (in this case, the Seventh Circuit), rather than the Federal Circuit. App., *infra*, 21a.

The Federal Circuit, finding the issue "close," denied the government's motion to transfer. App., *infra*, 18a-22a.

3. A merits panel of the Federal Circuit subsequently vacated the district court's decision and reinstated respondent's FCRA claim. App., *infra*, 1a-17a. Unlike the district court, the Federal Circuit declined to consider whether there is an express and unequivocal waiver of the United States' sovereign immunity in FCRA itself. *Id.* at 14a. The court instead applied a "less stringent" standard. *Ibid.*

a. The court of appeals believed that even if FCRA did not itself expressly waive the United States' sovereign immunity, the Little Tucker Act and the general Tucker Act could independently supply such a waiver. App., *infra*, 7a. The panel noted that the Little Tucker Act and Tucker Act not only supply district-court or Court of Federal Claims jurisdiction over certain categories of claims, but also waive the United States' sovereign immunity with respect to those categories of claims. *Id.* at 6a-7a. The panel concluded from that premise that the sovereign-immunity issue in this case could be resolved simply by reexamining the question that had been tentatively addressed by the motions panel as a threshold jurisdictional matter—namely, whether FCRA suits fall within the type of claims covered by the Little Tucker Act. *Ibid.*

In the panel's view, the applicable mode of analysis for this case could be extrapolated from *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465 (2003), a case in which this Court had analyzed whether an Indian tribe had a cause of action based on a statute governing the use of property held in trust for the tribe. The right question to ask in this case, the court believed, was whether, treating the Little Tucker Act as the requisite waiver of sovereign immunity, FCRA "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." App., *infra*, 7a (quoting *White Mountain Apache Tribe*, 537 U.S. at 472). The panel emphasized that this test "demands a showing 'demonstrably lower' than the initial waiver of sovereign immunity." *Ibid.* (quoting *White Mountain Apache Tribe*, 537 U.S. at 472). "It is enough," the panel stated, "that a statute creating a Tucker Act right be reasonably amenable to the reading that it mandates a

right of recovery in damages. While the premise to a Tucker Act claim will not be 'lightly inferred,' . . . a fair inference will do." *Ibid.* (quoting *White Mountain Apache Tribe*, 537 U.S. at 473).

b. The government objected to that mode of analysis, contending that it would be improper to rely on the Little Tucker Act to circumvent the requirement that FCRA itself unequivocally waive sovereign immunity. The government did not dispute the basic premise that, with respect to certain kinds of damages claims, the Tucker Act both grants jurisdiction and waives sovereign immunity. But the government asserted that FCRA was not the kind of statute as to which the Tucker Act had ever been understood to apply.

Observing that FCRA already contains its own specific remedial scheme, the government contended that it would be inappropriate to supplant Congress's specific consideration of FCRA remedies with the more general provisions of the Tucker Act. App., *infra*, 10a, 15a-16a. The government additionally pointed to a number of specific inconsistencies between FCRA and the Tucker Act. First, FCRA allows all suits to be brought in district court (see 15 U.S.C. 1681p), whereas the Tucker Act's sovereign-immunity waiver (for suits seeking over $10,000) is contingent on filing in the Court of Federal Claims (see 28 U.S.C. 1491(a)(1)). App., *infra*, 11a-14a. Second, FCRA "provides for punitive and criminal punishment, which cannot be imposed upon the government under the Tucker Act." *Id.* at 14a. Third, FCRA "permits recovery for negligence, but the Tucker Act does not permit negligence claims." *Id.* at 15a. Fourth, FCRA's general two-year statute of limitations (see 15 U.S.C. 1681p) is shorter than the Tucker Act's

six-year statute of limitations (see 28 U.S.C. 2401(a), 2501). App., *infra*, 16a.

c. The Federal Circuit rejected the government's arguments and concluded that the Tucker Act and Little Tucker Act waive the United States' sovereign immunity with respect to suits alleging violations of FCRA, even if FCRA itself does not contain the requisite waiver. App., *infra*, 7a-16a. The government had acknowledged at oral argument that FCRA's general definition of "person" in 15 U.S.C. 1681a(b), which includes "any * * * government," includes the United States for some purposes. App., *infra*, 10a-11a; see Oral Argument Recording, No. 2009-1546, at 14:18-16:15, 18:40-19:07 (Fed. Cir. Aug. 2, 2010). The Federal Circuit panel reasoned from this that a "fair interpretation" of the term "person" in the particular context of 15 U.S.C. 1681n—which allows a "person" to be sued for damages (including statutory and punitive damages) for a willful violation of FCRA—would also include the United States. App., *infra*, 11a.

The court declined to reach the question whether this reasoning would be sufficient to find "an 'express' waiver of sovereign immunity in FCRA" itself. App., *infra*, 14a. But the court deemed this reasoning sufficient under the "less stringent" test it applied, *ibid.*, and reinstated respondent's complaint on that basis, *id.* at 1a.

4. The Federal Circuit denied rehearing en banc. App., *infra*, 31a-32a.

REASONS FOR GRANTING THE PETITION

The Federal Circuit erred in concluding that the United States can be sued for damages for alleged violations of FCRA. FCRA is a self-contained statute of gen-

eral applicability with its own detailed remedial scheme. Had Congress intended to subject the United States to damages under FCRA, it would have made that clear in FCRA itself. But Congress did not do so. FCRA does not satisfy the "critical requirement" that a "waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text." *Lane* v. *Peña*, 518 U.S. 187, 192 (1996). And that critical requirement cannot be circumvented or watered down by relying on the general terms of the Tucker Act rather than on FCRA's own specific remedial provisions. The Tucker Act supplies an autonomous remedial scheme for certain types of statutes that do not themselves expressly address questions of remedy. It neither supersedes, nor provides a distorting lens through which to view, another statute's own organic remedial scheme. That is particularly so here, because FCRA's remedial scheme directly conflicts with the Tucker Act.

This Court should grant certiorari to review the Federal Circuit's erroneous decision. The Federal Circuit's decision conflicts with decisions of this Court recognizing limitations on the Tucker Act; significantly expands the jurisdiction of the Federal Circuit, and of the Court of Federal Claims and district courts, under the Tucker Acts; and invites circumvention of other comprehensive statutory schemes. In addition, under FCRA alone, the Federal Circuit's decision opens the door to vast potential federal liability. FCRA is a far-reaching consumer-protection statute that imposes a wide range of duties on employment-related and lending-related activities—activities in which the federal government broadly engages. The Federal Circuit's decision would impose liability on the government for not only willful, but also negligent, violations of those provisions. See 15 U.S.C.

1681*o*. Plaintiffs across the country would be able to take advantage of the decision, because the Federal Circuit has nationwide jurisdiction over appeals in all suits arising under the Tucker Act or Little Tucker Act. 28 U.S.C. 1295(a)(2) and (3). There is no reasonable prospect that the Federal Circuit, which denied rehearing in this case, will change its mind on the question presented. This Court's intervention is therefore necessary.

A. The Tucker Act And Little Tucker Act Do Not Waive The United States' Sovereign Immunity With Respect To FCRA Claims

The Federal Circuit's conclusion that the Tucker Act or Little Tucker Act can supply a sovereign-immunity waiver for a claim brought pursuant to FCRA's remedial provisions has three critical flaws. First, the Tucker Acts do not apply to statutes that, like FCRA, have their own self-contained remedial schemes. Second, even assuming the Tucker Acts could ever apply to such a statute, conflicts between FCRA and the Tucker Acts demonstrate that they would not apply to FCRA in particular. Third, the Federal Circuit's decision fails even on its own terms, because not only does FCRA lack the requisite unequivocal waiver of the United States' sovereign immunity to damages actions, but also FCRA cannot "fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." App., *infra*, 7a (citations omitted).

1. a. The Tucker Act and Little Tucker Act are designed as autonomous remedial provisions for the vindication of certain substantive rights as to which no complete damages remedy has otherwise been provided. Originally enacted in 1886, the Tucker Act evolved from congressional efforts to provide a judicial remedy for

damages against the United States in circumstances in which it otherwise would have been necessary for Congress to pass a specialized bill to give redress to an aggrieved person. See *United States* v. *Mitchell*, 463 U.S. 206, 212-213 (1983). The Tucker Act and Little Tucker Act supply a basis for jurisdiction and a waiver of sovereign immunity for such claims. See 28 U.S.C. 1346(a)(2), 1491(a)(1); see, *e.g.*, *Mitchell*, 463 U.S. at 215. Associated provisions supply a statute of limitations for those claims. See 28 U.S.C. 2401(a), 2501(a).

In keeping with the Tucker Act's design and purpose, this Court has repeatedly held that statutes with their own specific enforcement schemes are not separately enforceable in a suit for monetary compensation under the Tucker Act. For example, in *United States* v. *Fausto*, 484 U.S. 439 (1988), the Court concluded that a federal employee could not maintain a Back Pay Act suit against the United States under the Tucker Act. The Court emphasized that the "comprehensive and integrated" review provisions of the Civil Service Reform Act separately provided for administrative and judicial review of back pay claims against the federal government. *Id*. at 454. Similarly, in *Brown* v. *General Services Administration*, 425 U.S. 820, 834 (1976), the Court held that a claim based on alleged employment discrimination by a federal agency could not be brought against the United States under the Tucker Act. The Court relied in part on legislative history indicating congressional intent that Title VII supply the only remedy, but also stressed the "balance, completeness, and structural integrity" of the Title VII remedy, and the principle that "a precisely drawn, detailed statute pre-empts more general remedies." *Id.* at 828-834.

The Court has applied that same principle in other Tucker Act cases, including recently in *Hinck* v. *United States*, 550 U.S. 501 (2007). In *Hinck*, the Court held that a suit to abate interest on federal taxes could be brought only in the Tax Court under a special provision of the Internal Revenue Code, and not under the Tucker Act. *Id.* at 506-507. The Court observed that the Internal Revenue Code provision already "provide[d] a forum for adjudication, a limited class of potential plaintiffs, a statute of limitations, a standard of review, and authorization for judicial relief." *Id.* at 506; see also, *e.g.*, *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982) (holding that Medicare reimbursement disputes are governed by the "precisely drawn provisions" of the Medicare statute rather than the Tucker Act).

The specific-governs-the-general principle dictates the outcome of this case as well. As was the case in *Hinck*, FCRA has its own "precisely drawn, detailed" remedial scheme that "provides a forum for adjudication, a limited class of potential plaintiffs, a statute of limitations, a standard of review, and authorization for judicial relief." 550 U.S. at 506. FCRA's jurisdictional provision, 15 U.S.C. 1681p, specifies both a forum for adjudication ("in any appropriate United States district court, without regard to the amount in controversy, or in any other court of competent jurisdiction") and a statute of limitations (the earlier of five years after the violation or two years after its discovery by the plaintiff). The civil-remedies provisions, 15 U.S.C. 1681n and 1681*o*, identify a class of potential plaintiffs ("consumer[s]"), a standard of review (the state of mind, namely, willfulness or negligence, necessary for liability to attach), and authorization for judicial relief (actual, statutory, and/or punitive damages, plus fees and costs).

FCRA's specific, self-contained scheme accordingly "pre-empts more general remedies" like the Tucker Act and Little Tucker Act. *Hinck*, 550 U.S. at 506. When it comes to FCRA, there is simply no room for the Tucker Act's autonomous remedial provisions.

It is no answer to say that the Tucker Act supplements FCRA's remedial provisions by supplying a sovereign-immunity waiver that FCRA itself does not contain. It was equally true in other cases discussed above that the Tucker Act might have allowed plaintiffs to avoid some limitation in the self-contained remedial scheme. See, *e.g.*, *Hinck*, 550 U.S. at 509 (specific remedial statute restricted class of plaintiffs eligible to seek relief); *Brown*, 425 U.S. at 824 (specific remedial statute required suit within 30 days of final agency action). The Court has disallowed Tucker Act remedies in such cases precisely *because* they would circumvent applicable limitations. In *Hinck*, for example, the petitioners argued that they could rely on the substance of the specific tax statute at issue (which allowed for abuse-of-discretion review of certain agency decisions) while importing the Tucker Act for other remedial purposes. 550 U.S. at 506. The Court rejected that effort, explaining that "[w]e cannot accept the Hincks' invitation to isolate one feature of this 'precisely drawn, detailed statute'—the portion specifying a standard of review—and use it to permit taxpayers to circumvent the other limiting features Congress placed in the *same* statute." *Id.* at 507.

The Federal Circuit in this case engaged in the same sort of mixing and matching that the Court rejected in *Hinck*. It relied on the substance of 15 U.S.C. 1681n, which allows damages claims for willful violations of FCRA, while invoking the Tucker Act to remove any sovereign-immunity limitation on that provision's scope.

App., *infra*, 10a-11a, 14a. This Court has made clear, however, that the Tucker Act cannot be employed to create such hybrid suits and remedies.

b. The Federal Circuit's methodology threatens to undermine this Court's well-established sovereign-immunity jurisprudence. When a plaintiff attempts to sue the government under a generally applicable civil-remedy statute like 15 U.S.C. 1681n, the well-established analytical framework focuses on whether that statute itself contains the requisite unequivocal waiver of the federal government's sovereign immunity. In *Lane* v. *Peña*, for example, a plaintiff sought to sue the federal government for a violation of Section 504(a) of the Rehabilitation Act. 518 U.S. at 191. This Court analyzed the Rehabilitation Act, found no unambiguous waiver of federal sovereign immunity in the statute's text, and consequently affirmed the dismissal of the suit. *Id.* at 190-200.

The outcome of *Lane* and similar cases should not change simply because a plaintiff, like respondent here, seeks to invoke the Little Tucker Act or the Tucker Act as a basis for jurisdiction. Cf. *Brown*, 425 U.S. at 833 ("It would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading."). The Federal Circuit cited no case, and we are aware of none, in which this Court has applied a "less stringent" "fair interpretation" rule, App., *infra*, 7a, 14a, to find the United States liable for damages under the remedial provisions of a generally applicable statute that does not itself unequivocally waive the sovereign immunity of the United States. Instead, as illustrated by the case primarily relied upon by the Federal Circuit here—*United States* v. *White Mountain Apache Tribe*,

537 U.S. 465 (2003) (cited at, *e.g.*, App., *infra*, 7a)—the "fair interpretation" rule is applied in a very different context.

White Mountain Apache Tribe did not involve a statute of general applicability or a statute with its own remedial scheme. Rather, the statute in that case, which stated that the United States would hold certain land in trust for an Indian tribe, unambiguously applied *only* to the United States and said nothing about remedies. 537 U.S. at 468-469. The issue in the case was whether Congress would have wanted the remedial scheme of the Indian Tucker Act (28 U.S.C. 1505), which waives sovereign immunity to certain monetary claims by Indian tribes, to provide damages if the government failed to carry out the duties imposed by the statute. *White Mountain Apache Tribe*, 537 U.S. at 468-469. In other words, the question was whether any remedial scheme for damages at all should apply to the statute providing for the particular Indian property to be held in trust by the United States. It was to answer that question that the Court analyzed whether the particular Indian statute "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Id.* at 472 (citation omitted).

By choosing to apply that test to this case, the Federal Circuit picked the wrong tool for the job. The question here is not whether FCRA calls for a remedial scheme—it already has one of its own. The question in this case therefore should be whether that FCRA scheme itself provides an unambiguous waiver of sovereign immunity to suit against the United States. The test drawn from *White Mountain Apache Tribe*—whether a statute that applies only to the United States can in turn fairly be interpreted to contemplate the pay-

ment of compensation in the event of a violation—does not help to answer that question, because it is not the test for finding a waiver of sovereign immunity. The Federal Circuit fundamentally erred in treating the standard drawn from *White Mountain Apache Tribe* as simply a "less stringent" (App., *infra*, 14a) substitute for the traditional rule that a comprehensive statute must itself clearly and unequivocally waive the United States' sovereign immunity to damages actions.

2. Even assuming, however, that the Tucker Act could, in theory, be grafted onto another statute's existing, self-contained remedial scheme, that operation would be impossible here. The Tucker Act conflicts in a number of critical ways with FCRA.

a. To begin with, FCRA's own jurisdictional provision, 15 U.S.C. 1681p, directs plaintiffs to different courts than the Tucker Act does. Section 1681p specifically provides that "[a]n action to enforce any liability created under this subchapter may be brought in any appropriate United States district court, without regard to the amount in controversy, or in any other court of competent jurisdiction." Under the plain language of the statute, any action cognizable under FCRA is one that can be brought in district court.

The Tucker Act, in contrast, does not allow all monetary claims against the United States covered by the Act to be brought in district court. The Tucker Act provides that "[t]he United States Court of Federal Claims shall have jurisdiction" over the types of damages claims it covers. 28 U.S.C. 1491(a)(1). The Little Tucker Act allows those same types of claims also to be brought in district court, but only when the plaintiff seeks no more than $10,000. 28 U.S.C. 1346(a)(2). For a claim of more

than $10,000, the Court of Federal Claims (CFC) is the only place a plaintiff may go.

These conflicting jurisdictional directives cannot be reconciled. The Federal Circuit believed that the provisions could be harmonized simply by considering the CFC to be a "court of competent jurisdiction" in which Section 1681p would authorize suit. App., *infra*, 12a. But that does not solve the problem. Section 1681p provides that a plaintiff can file any FCRA claim in district court "*or* in any *other* court of competent jurisdiction" (emphasis added). It therefore presumes that the district court is itself *always* competent to adjudicate a FCRA claim. It does not contemplate that other, unspecified federal courts, such as the CFC, might award damages that are unavailable in district court. The reference to "other court[s] of competent jurisdiction" simply ensures that FCRA claims may be brought in state court in addition to federal district court. See *Bank One Chicago, N.A.* v. *Midwest Bank & Trust Co.*, 516 U.S. 264, 268 (1996) (describing similarly worded statute as "provid[ing] for concurrent federal-court and state-court jurisdiction").

b. Allowing a FCRA action against the United States to proceed under the Tucker Act would be improper for the additional reason that FCRA suits fall outside the class of claims covered by the Tucker Act to begin with. FCRA's primary civil-remedies provisions, which provide damages for FCRA violations committed "willfully" (15 U.S.C. 1681n) or "negligent[ly]" (15 U.S.C. 1681*o*), define statutory claims sounding in tort. See *Safeco Ins. Co. of Am.* v. *Burr*, 551 U.S. 47, 57, 69 (2007) (construing Section 1681n by reference to tort treatises); *Bigby* v. *United States*, 188 U.S. 400, 408 (1903) ("Causing harm by negligence is a tort."). But

the Tucker Act has never permitted claims against the United States "sounding in tort." 28 U.S.C. 1346(a)(2), 1491(a)(1); see, *e.g.*, *United States* v. *Tohono O'odham Nation*, 131 S. Ct. 1723, 1729 (2011) (describing Tucker Act as a "general waiver of sovereign immunity for non-tort claims for monetary relief"); *United States* v. *Hohri*, 482 U.S. 64, 66 n.1 (1987) (describing Little Tucker Act and Tucker Act jurisdiction as "limited to nontort claims"); *Bigby*, 188 U.S. at 403 ("It is clear that the act excludes from judicial cognizance any claim against the United States for damages in a case 'sounding in tort.'").

The Federal Circuit attempted to bridge this gap, at least with respect to negligence suits under Section 1681*o*, by positing a difference between "a negligence claim" (which, it conceded, would not be covered by the Tucker Act) and "a statutory claim that includes an element which is analyzed under a negligence standard" (which, in its view, would be allowable under the Tucker Act). App., *infra*, 15a. But this Court has drawn no distinction between statutory and nonstatutory torts in this context. The Court held in *Schillinger* v. *United States*, 155 U.S. 163 (1894), for example, that a claim for patent infringement was barred under the Tucker Act as one "sounding in tort," notwithstanding a federal statutory cause of action for patent infringement. *Id.* at 169 (citing Rev. Stat. § 4919 (1870)).

Moreover, Congress has enacted a separate statute, the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b)(1), which waives the United States' sovereign immunity for claims based on torts committed by a federal officers and employees. But the FTCA provides for liability only if the United States, if a private person, would be liable under *state* law. 28 U.S.C. 1346(b)(1).

Torts based on asserted violations of federal statutes are not covered. See, *e.g.*, *FDIC* v. *Meyer*, 510 U.S. 471, 477-478 (1994). That limitation cannot be circumvented by bringing an action under the Tucker Act, which has never applied to cases sounding in tort.

c. FCRA and the Tucker Act conflict in other relevant respects as well. For one thing, a plaintiff suing for a willful violation of FCRA may seek punitive damages. 15 U.S.C. 1681n(a)(2). But, as the Federal Circuit acknowledged, the Tucker Act allows an award only of compensatory damages. App., *infra*, 14a (citing *Brown* v. *United States*, 105 F.3d 621, 623 (Fed. Cir. 1997)). The Federal Circuit accordingly decided that it would recognize only those FCRA claims that (as is the case with the complaint here) do not seek punitive damages. *Id.* at 15a; see *id.* at 96a. But the difference in the types of remedies available under FCRA (as opposed to the Tucker Act) illustrates why Congress could not have intended the latter to be a basis for asserting whatever FCRA damages claims might lie against the United States.

That point is further illustrated by differences in the two remedial schemes' limitations periods. FCRA claims are cabined by a distinct statute of limitations, and must be asserted no later than two years after the date of the discovery of the violation that is the basis of liability, or five years after the date on which the violation occurs, whichever date is earlier. 15 U.S.C. 1681p(1) and (2). Tucker Act and Little Tucker Act suits, in contrast, are governed by six-year statute of limitations. See 28 U.S.C. 2401(a), 2501. This Court has viewed differences in limitations periods as an indication that a more specific remedial scheme should govern over the general. See, *e.g.*, *EC Term of Years Trust* v. *United*

States, 550 U.S. 429, 433-434 (2007) (rejecting reliance on more general remedial provision that would allow plaintiffs to "effortlessly evade" more specific statute's limitations period); *Brown*, 425 U.S. at 833 (similar).

The Federal Circuit dismissed this concern by noting that "different statutes of limitations are common in federal practice," and stating that "the rule is that the more specific limit prevails, not that a short limit cancels out any substantive statute." App., *infra*, 16a (internal quotation marks and citation omitted). But the Federal Circuit's citation of *United States* v. *Clintwood Elkhorn Mining Co.*, 553 U.S. 1 (2008), does not support that proposition. *Clintwood Elkhorn Mining* addressed a statute broadly specifying that "*[n]o suit* . . . shall be maintained in *any court* for the recovery of *any internal revenue tax* alleged to have been erroneously or illegally assessed" unless the taxpayer had complied with a two-year limitations period for filing an administrative claim. *Id*. at 7 (quoting 26 U.S.C. 7422(a)). The Court held that this universal statute of limitations would apply "whatever the source of the cause of action," and thus expressly declined to address the question whether the respondents' tax-refund suit in that case could be brought "directly under the Tucker Act." *Id.* at 9. Because the Court did not address whether the Tucker Act could have provided the respondents with a remedy, it had no occasion to address the principle—established in the other cases already discussed—that a remedial scheme more specific in its limitations period and other respects excludes a more general scheme altogether.

That principle prevents a court from superimposing the Tucker Act atop an existing remedial scheme, and it certainly prevents the mixed Tucker Act-FCRA scheme created by the Federal Circuit in this case. Congress

could not have intended a scheme that incorporates the Tucker Act's sovereign-immunity waiver while dispensing with its bar against tort suits and its statute of limitations, and incorporates FCRA's liability provisions while dispensing with its jurisdictional limitations and its provision for noncompensatory damages. This judicially created hybrid is at odds with both statutes, is supported by neither, and has no legitimate legal basis.

3. Finally, even assuming away the conflicts between the remedial schemes, and accepting for argument's sake the premise that the Tucker Act *might* apply, FCRA cannot "fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." App., *infra*, 7a (citation omitted). FCRA contains no "unequivocal expression" of Congress's intent to waive the United States' sovereign immunity, *Lane*, 518 U.S. at 192 (citation omitted), nor would it satisfy the Federal Circuit's "less stringent" test for a Tucker Act waiver, App., *infra*, 14a.

The Federal Circuit's belief that the United States should be liable under FCRA's civil remedies provisions, 15 U.S.C. 1681n and 1681*o*, was premised entirely on the statutory definition of "person" in 15 U.S.C. 1681a(b) to include "any * * * government or governmental subdivision or agency." App., *infra*, 10a-11a. The government has acknowledged that the term "person" in some FCRA contexts could include the United States. *Ibid.* But the history and structure of FCRA demonstrate that Congress never intended the term "person" to include the United States in the context of civil-remedies provisions subjecting a "person" to damages liability. See *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 344 (1997) (interpretation of defined term can depend on context); *United States* v. *Public Utils. Comm'n*, 345 U.S. 295,

312-313 & n.20 (1953) (declining to apply statutory definition of "person" to particular section of Public Utility Act of 1935 in which term appeared); *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U.S. 755, 764 (1949) ("[W]e have * * * consistently refused to pervert the process of interpretation by mechanically applying definitions in unintended contexts.").

a. When Congress first enacted the definition of "person" in 15 U.S.C. 1681a(b), the definition did not have any effect of directly imposing liability on federal, state, or local governments. The definition dates back to the original passage of FCRA in 1970. See Act of Oct. 26, 1970, Pub. L. No. 91-508, § 601, 84 Stat. 1127, 1128 (1970 Act). As originally enacted, FCRA principally regulated "consumer reporting agencies"—entities that aggregate and disseminate personal information about consumers, which third parties use to determine a consumer's eligibility for credit, insurance, or employment, or for other enumerated purposes. *Id.* at 1129 (defining consumer reporting agency); *id.* at 1129-1133 (imposing substantive requirements on consumer reporting agencies); see 15 U.S.C. 1681a(f) (current statutory definition of "credit reporting agency"). The only requirements imposed directly upon "person[s]" related to the procurement of investigative consumer reports. 1970 Act, 84 Stat. 1130; see also *id.* at 1133 (suggesting that a "person" might also be subject to additional requirement if he used a consumer report). Consistent with its focus on credit reporting agencies, the damages provisions of the 1970 Act applied not to "persons" but to consumer reporting agencies and "user[s] of information." 1970 Act, 84 Stat. 1134. The choice of language in defining the term "person" therefore did not reflect an expectation that FCRA could be the basis for a damages claim

against the federal government (or a State, or a local government).

Indeed, Congress did not even intend the statutory definition of "person" to apply universally across the 1970 Act itself. The 1970 Act included a provision, still in FCRA today, subjecting "[a]ny person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses" to a fine of up to $5000 or imprisonment of up to one year. 84 Stat. 1134 (15 U.S.C. 1681q). Congress could not have intended the term "person" in the context of that criminal provision to include governments, especially the United States.

b. Twenty-six years after FCRA's enactment, the Consumer Credit Reporting Reform Act of 1996 significantly expanded the scope of FCRA to regulate persons who provide information to reporting agencies and persons who make use of credit reports. Pub. L. No. 104-208, §§ 2401 *et seq.*, 110 Stat. 3009-426. The Act, for example, prohibited persons from procuring certain consumer information for employment purposes except in enumerated circumstances and restricted the ways in which employers may use consumer credit information in taking employment actions. §§ 2403, 2411, 110 Stat. 3009-431, 3009-443 to -444 (15 U.S.C. 1681b(b)(2)-(3), 1681m(a)). The Act also modified the civil-remedies provisions to reflect the expanded scope of the statute beyond its original focus on consumer reporting agencies. In particular, it amended those provisions to apply to "person[s]" rather than just to consumer reporting agencies and users of information. See § 2412(a) and (d), 110 Stat. 3009-446.

In making that change, Congress did not refer to the 1970 Act's definition of "person," and nothing in the leg-

islative history of the 1996 Act suggests that Congress believed it was exposing governmental entities to significant new liabilities. The House Report on a prior version of the 1996 legislation noted only that extension of the liability provisions to "any person who" fails to comply with FCRA's requirements would bring within the scope of the provisions "persons who furnish information to consumer reporting agencies, such as banks and retailers." H.R. Rep. No. 486, 103d Cong., 2d. Sess. 49 (1994); see also S. Rep. No. 185, 104th Cong., 1st. Sess. 48-49 (1995).

It would be unusual, in and of itself, to construe amendments to an existing scheme as allowing new damages actions against the United States when neither the text nor history of the amendments demonstrates that Congress intended to do so. See *Employees of the Dep't of Pub. Health & Welfare* v. *Department of Pub. Health & Welfare*, 411 U.S. 279, 283-285 (1973) (holding that amendments making States subject to the Fair Labor Standards Act did not create monetary liability even though States fell within pre-existing definition of "employer"); cf. *Public Utils. Comm'n*, 345 U.S. at 312-313 (declining to apply statutory definition of "person" when legislative history showed Congress did not intend to incorporate it). Additional factors demonstrate that the 1996 FCRA amendments, in particular, cannot be so construed.

The amendments, like the 1970 Act, demonstrate that Congress did not intend the definition of "person" to be the same across every provision. In addition to amending the civil-remedies provisions to apply to "person[s]," the amendments also added provisions authorizing FCRA enforcement suits to be brought by the Federal Trade Commission (FTC) and the States

against "person[s]" in certain circumstances. §§ 2417, 2418, 110 Stat. 3009-451 to 3009-452. As with the preexisting criminal provision, Congress, without expressly so providing, cannot be understood to have intended the United States or a federal agency to be a "person" subject to an enforcement action by a State or the FTC.

Moreover, in the context of the civil-remedies provisions, it is especially unlikely that Congress intended a definition that would include the United States. If a "person" for purposes of FCRA's civil-remedies provisions in fact included "any * * * government," including the federal government, it would also necessarily include a State. But Congress enacted FCRA's amended civil-remedies provision only months after this Court's decision in *Seminole Tribe* v. *Florida*, 517 U.S. 44, 47, 72 (1996), which held that Congress lacked authority under the Commerce Clause to abrogate state sovereign immunity to damages actions. It would have been extraordinary if Congress had responded to *Seminole Tribe* by attempting to subject States to both compensatory and punitive damages under FCRA, and there is no indication that it sought to do so. Congress's use of the term "person" in the 1996 amendment to the civil-remedies provision of FCRA therefore should not be construed to abrogate preexisting immunity to damages suits of sovereign entities, including the States and the United States.

Additionally, Congress had demonstrated earlier that same year that, when it wanted to allow damages actions against the United States under FCRA, it could and would do so expressly. A previous 1996 FCRA amendment had empowered the Federal Bureau of Investigation to obtain and use consumer information from consumer reporting agencies in limited circumstances

for national security purposes. See Intelligence Authorization Act for Fiscal Year 1996, Pub. L. No. 104-93, § 601(a), 109 Stat. 974 (codified, as amended, at 15 U.S.C. 1681u). As part of that amendment, Congress had provided that "[a]ny agency or department of the United States obtaining or disclosing any consumer reports, records, or information contained therein in violation of this section is liable to the consumer" for statutory, actual, and, under certain circumstances, punitive damages. 109 Stat. 976-977 (15 U.S.C. 1681u(i)). Having so recently employed such explicit language when it intended to expose the federal government to damages, Congress can be expected to have done the same if it had intended to expose the federal government to damages liability in its amendments to the general civil-remedies provisions later in the same year.

Finally, Congress is unlikely to have intended the 1996 FCRA amendments to disrupt the carefully calibrated remedies available against the federal government under the Privacy Act of 1974. The Privacy Act comprehensively regulates the accuracy and disclosure of official government records, including the disclosure of record information to consumer reporting agencies. See 5 U.S.C. 552a(a)(1)-(5) and (b); *Doe* v. *Chao*, 540 U.S. 614, 618 (2004). The Privacy Act expressly permits recovery of "actual damages" from the United States for violations of certain disclosure-related provisions, when such violations are "intentional or willful." See 5 U.S.C. 552a(g)(1)(C), (D) and (4). The extent of liability under the Privacy Act was the subject of extensive congressional debate: Congress considered and rejected amendments that would have allowed recovery for negligent violations, or for punitive damages. See *Fitzpatrick* v. *IRS*, 665 F.2d 327, 330 (11th Cir. 1982), abrogated in

part on other grounds by *Doe*, 540 U.S. 614. Multiple members of Congress expressed concern about the dramatic effect that such amendments would have on the federal fisc. See, *e.g.*, 120 Cong. Rec. 36,659-36,660 (1974) (Reps. McCloskey, Erlenborn, and Butler); *id.* at 36,956 (Rep. Butler). It is unlikely that Congress, without even mentioning the matter, would have undermined the compromise it reached in the Privacy Act context by authorizing FCRA damages suits against the United States.

B. The Court Of Appeals' Ruling Conflicts With Decisions Of This Court And Presents A Question Of Exceptional Importance That Warrants Review

This Court should grant certiorari to address the Federal Circuit's erroneous conclusion that the Tucker Act and Little Tucker Act waive the United States' sovereign immunity to FCRA claims. As explained above, the court of appeals' reasoning—that the Tucker Acts can provide a waiver of sovereign immunity even for claims under a statute of general applicability that has its own comprehensive remedial scheme—cannot be squared with this Court's longstanding Tucker Act jurisprudence. The Federal Circuit's fundamental methodological error has serious consequences. It provides a basis for plaintiffs to argue that any number of statutes of general applicability both regulate the conduct of the federal government and allow damages suits against the United States for any violations. By accepting such an argument, the Federal Circuit expands its own jurisdiction, the Court of Federal Claims' and district courts' jurisdiction under the Tucker Acts, and the scope of federal liability in ways that Congress neither intended nor contemplated.

This case illustrates the point. The court of appeals' decision invites FCRA suits against the United States, including large putative class-action suits like this one, nationwide, and thereby exposes the public fisc to potentially massive liability. Indeed, even independent of the broader implications of the Federal Circuit's errors, its FCRA conclusion alone would warrant certiorari.

1. The practical impact of the Federal Circuit's FCRA holding is potentially very significant. FCRA regulates a wide range of conduct by "person[s]" who use or disclose information obtained from credit reporting agencies—in particular, "consumer reports," broadly defined to include "any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living," when collected for the purpose of evaluating a consumer's fitness for credit, suitability for employment, or other enumerated purposes. 15 U.S.C. 1681a(d)(1). FCRA broadly provides that a "person shall not use or obtain a consumer report for any purpose" except as provided by FCRA. 15 U.S.C. 1681b(f). A "person" also "may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer," except in certain enumerated circumstances. 15 U.S.C. 1681b(b)(2)(A); see 15 U.S.C. 1681a(c) (defining "consumer" as "an individual"); see also 15 U.S.C. 1681d(a) ("A person may not procure or cause to be prepared an investigative consumer report on any consumer" except in specifically enumerated circumstances.). FCRA similarly places conditions on the use of consumer reports by "person[s]" to take "adverse action" against (among others) loan recipients, loan ap-

plicants, employees, and potential employees. 15 U.S.C. 1681b(b)(3), 1681m(a); see 15 U.S.C. 1681a(k)(1)(A) (defining "adverse action," by reference to 15 U.S.C. 1691(d)(6), to include denials or changes in terms of loans); 15 U.S.C. 1681a(k)(1)(B)(ii) (defining "adverse action" to include "a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee").

In addition to regulating the use of consumer reports by "person[s]," FCRA also broadly regulates the disclosure of consumer information. For example, "person[s]" who disclose information to consumer reporting agencies must conduct a timely investigation, and correct their disclosures, when the consumer disputes the information's accuracy. 15 U.S.C. 1681s-2(b). Another example is the provision at issue in this case, which requires any "person that accepts credit cards" to "print" no "more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction." 15 U.S.C. 1681c(g)(1).

2. The federal government pervasively engages in the kinds of transactions covered by FCRA, and both uses and disseminates large quantities of the type of consumer credit information FCRA regulates. The federal government had a total of $625.8 billion in receivables for Fiscal Year 2010, 88% of which was attributable to loans. Department of the Treasury, Financial Mgmt. Serv., *Fiscal Year 2010 Report to the Congress: U.S. Government Receivables and Debt Collection Activities of Federal Agencies* 4 (Mar. 2011), http://www.fms.treas.gov/news/reports/debt10.pdf (*2010 Receivables Report*). It is also the Nation's largest employer, with over two million civilian employees, exclud-

ing the Postal Service. U.S. Dep't of Labor, Bureau of Labor Statistics, *Career Guide to Industries, 2010-11 Edition* (July 2011), http://www.bls.gov/oco/cg/cgs041.htm.

In recognition of federal-government activities, FCRA explicitly provides a damages remedy for the misuse and unlawful disclosure of certain national security information obtained by the Federal Bureau of Investigation from consumer reporting agencies. 15 U.S.C. 1681u(i). And, as discussed, the Privacy Act already comprehensively addresses the disclosure of personal information by federal agencies. 5 U.S.C. 552a. The court of appeals' ruling that the federal government is liable for statutory and compensatory damages under the Tucker Act for the many additional obligations FCRA imposes on "person[s]" threatens to expose the United States to massive additional liability without the clear authorization by Congress that is required for a waiver of sovereign immunity and without explicit limit.

The claim at issue here is illustrative. Respondent's suit arises from a single credit-card transaction in which he paid a $350 federal-court filing fee using pay.gov, a federal-government website for processing online payments. App., *infra*, 85a-86a. Respondent alleges that he received an electronic transaction receipt that contained the expiration date of his credit card, in violation of Section 1681c(g)(1). *Id.* at 86a-87a. On the basis of this transaction, he seeks statutory damages on behalf of all individuals who received such receipts on or after June 4, 2008, *id.* at 92a, a claim that potentially encompasses millions of similar transactions. This Office is informed by the Department of the Treasury that 54 Executive departments, independent agencies, government corporations, and judicial- and legislative-branch entities to-

gether generate over 600 separate credit-card-transaction cash flows on pay.gov. The Department of Treasury is additionally aware of more than 400 credit-card transaction cash flows into the United States Treasury using systems other than pay.gov, an unknown number of which might be subject to similar claims.

And credit-card transactions are only part of the problem. The most serious impact of the Federal Circuit's decision probably would be on the debt-collection activities of federal program agencies. See, *e.g.*, *Talley* v. *United States Dep't of Agric.*, 595 F.3d 754, vacated on reh'g en banc, No. 09-2123, 2010 WL 5887796 (7th Cir. Oct. 1, 2010) (suit against the federal government alleging inaccurate reporting of debt-collection information by the Department of Agriculture to a credit reporting agency). Agencies engaging in direct lending to the public report payment delinquencies—of which there are many—to credit reporting agencies. See *2010 Receivables Report* 4 (reporting over $100 billion in delinquencies in government receivables); see also *id.* at 5 (noting that, because federal loans are often high risk, there are high delinquency rates). The same is true of agencies that do not engage in direct lending, but guarantee consumer loans and are forced to assume those loans and attempt to collect them if they go bad. See *id.* at 4 (reporting that defaulted guaranteed loans accounted for $55.6 billion in federal receivables and $40.6 billion in delinquencies). Indeed, every federal agency is potentially subject to the possibility of needing to inform credit reporting agencies about delinquent debt because every federal agency has employees and contractors who could end up owing money to the agency due to an overpayment or improper payment. See *ibid.* (reporting $79.8 billion in "[a]dministrative [d]ebt" re-

ceivables, including "[f]ines, penalties, and overpayments").

3. By subjecting the full range of government operations to FCRA's diverse liability provisions, the Federal Circuit's decision is likely to take a toll on the fisc never contemplated by Congress. The effect of the decision is not confined to any geographic locale, but instead extends nationwide. As this case demonstrates, a plaintiff with a claim of less than $10,000, or one representing a putative class with individual claims of less than $10,000, can now simply file a FCRA claim in any district court, asserting the Little Tucker Act as the jurisdictional basis for the suit. A plaintiff with a larger claim can file in the Court of Federal Claims, which has nationwide jurisdiction, under the Tucker Act. In either circumstance, the Federal Circuit will assert that it, rather than any regional circuit, has jurisdiction over the case, and its decision in this case will therefore provide the governing law. See 28 U.S.C. 1295(a)(2)-(3); App., *infra*, 18a-22a.

Under these conditions, a circuit conflict is unlikely to develop. Nor is it realistic to expect that the Federal Circuit, which denied rehearing in this case, App., *infra*, 31a-32a, will revisit the question presented. This Court should grant certiorari now to correct the Federal Circuit's error and prevent the federal government from having to litigate, settle, and pay out claims as to which Congress never waived the United States' sovereign immunity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2011

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 2009-1546

JAMES X. BORMES, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA,
DEFENDANT-APPELLEE

Decided: Nov. 16, 2010

OPINION

Before: RADER, Chief Judge, and NEWMAN and MOORE, *Circuit Judges*.

RADER, *Chief Judge*.

James Bormes appeals the dismissal of his class action lawsuit under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681n(a). *See Bormes v. United States*, 638 F. Supp. 2d 958 (N.D. Ill. 2009). Because FCRA is a money-mandating statute that supports jurisdiction under 28 U.S.C. § 1346(a)(2), this court vacates the dismissal and remands for further proceedings.

I

On August 9, 2008, Bormes, an attorney, filed a lawsuit on behalf of one of his clients in the U.S. District Court for the Northern District of Illinois using its online document filing system. Bormes paid the filing fee using his credit card, and the transaction was processed through the government's pay.gov system. The government then provided Bormes with a confirmation webpage that appeared on Bormes' computer screen. The confirmation page contained the expiration date of Bormes' credit card.

Alleging that the display of his and similarly situated plaintiffs' credit card information violated section 1681c(g)(1) of FCRA, Bormes filed a class action lawsuit against the government. Bormes seeks, among other things, statutory damages, attorney's fees, and costs. In his complaint, Bormes alleged jurisdiction under both 28 U.S.C. § 1346(a)(2), commonly referred to as the Little Tucker Act, and FCRA's own jurisdictional provision, 15 U.S.C. § 1681p.

The government filed a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted. The district court concluded that it had jurisdiction under FCRA, but granted the government's motion to dismiss under Rule 12(b)(6) on the ground that FCRA did not waive the federal government's sovereign immunity for this suit. Because the district court exercised jurisdiction under the jurisdictional provision in FCRA itself, it held that Bormes' arguments for jurisdiction under the Little Tucker Act were moot.

On appeal, the government filed a motion to transfer this case to the Court of Appeals for the Seventh Circuit. A motions panel of this court denied the motion on the ground that Bormes' complaint invoked the district court's jurisdiction under the Little Tucker Act. *Bormes v. United States*, No. 2009-1546, 2010 WL 331771, at *2 (Fed. Cir. Jan. 27, 2010). The panel did not, however, make any decision as to whether FCRA is a "money-mandating statute" sufficient to create jurisdiction under the Little Tucker Act.

After Bormes filed his appeal in this case, a panel of the Court of Appeals for the Seventh Circuit determined that the Tucker Act waives sovereign immunity for FCRA claims. *See Talley v. U.S. Dep't of Agric.*, 595 F.3d 754, 759 (7th Cir. 2010) (Easterbrook, C.J.). The appellate court in *Talley* also held that it did not need to transfer the case to this court because the plaintiff only sought to use the Tucker Act for a waiver of sovereign immunity, not as a basis for jurisdiction. "The Tucker Act *might* have been used for jurisdiction; it is *both* a grant of jurisdiction and a waiver of sovereign immunity. But if the plaintiff elects to use the latter without the former, then jurisdiction does not arise under the Tucker Act. This court therefore has appellate jurisdiction." *Id.* at 763.

The Seventh Circuit later granted the government's motion for rehearing *en banc* and vacated the panel opinion. In the order granting rehearing *en banc*, the court asked the parties to brief "whether the Tucker Act is the exclusive source of subject-matter jurisdiction for remedies that depend on its waiver of sovereign immunity and, if it is, whether this appeal should be transferred to the Federal Circuit under 28 U.S.C. § 1631."

Talley v. U.S. Dep't of Agric., 595 F.3d 754 (7th Cir. 2010) (reh'g en banc granted, opinion vacated, June 10, 2010). As of the date of this opinion, the *Talley* case remains pending.

II

The objective of FCRA is to "promote efficiency in the Nation's banking system and to protect consumer privacy." *TRW Inc. v. Andrews*, 534 U.S. 19, 23 (2001). The 1970 Act originally regulated "consumer reporting agenc[ies]," or "any person" who assembles or evaluates personal information about consumers that is used to determine eligibility for credit and insurance, among other purposes. 15 U.S.C. § 1681a(d),(f) (2006). FCRA also originally imposed duties on "persons," for example, prohibiting a person from furnishing any information about consumers "to any consumer reporting agency if the person knows or has reasonable cause to believe that the information is inaccurate." 15 U.S.C. § 1681s-2(a)(1)(A) (2006). The Act defined the term "person" in FCRA to mean "*any* individual, partnership, corporation, trust, estate cooperative association, *government or governmental subdivision or agency*, or other entity." 15 U.S.C. § 1681a(b) (2006) (emphases added). As originally enacted, however, the damages provisions for willful or negligent noncompliance with FCRA only covered "consumer reporting agenc[ies]" or "user[s] of information." Sections 616 and 617 of Pub. L. 91-508, 84 Stat. 1114, 1134 (1970).

In 1996, an amendment to FCRA made, among other things, the damages provisions applicable to "[a]ny person." Consumer Credit Reporting Reform Act of 1996, Section 2412 of Pub. L. 104-208, 110 Stat. 3009-446. Specifically, FCRA now provides as follows:

> (a) In general
>
> *Any person* who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—
>
> > (1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000; or
> >
> > (B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater;
> >
> > (2) such amount of punitive damages as the court may allow; and
> >
> > (3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

15 U.S.C. § 1681n (emphasis added).

In 2003, another amendment to FCRA added § 1681c(g)(1), the liability provision at issue in this case. Fair and Accurate Credit Transactions Act of 2003, Section 113 of Pub. L. 108-159, 117 Stat. 1959. That provision states:

> Except as otherwise provided in this subsection, *no person* that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration

> date upon any receipt provided to the cardholder at the point of the sale or transaction.

Id. (emphasis added).

III

The Little Tucker Act, 28 U.S.C. § 1346, gives the district courts jurisdiction, concurrent with the Court of Federal Claims, over "any other [than tax refund] civil action or claim against the United States, not exceeding $10,000 in amount, founded . . . upon any Act of Congress." The Little Tucker Act is therefore a jurisdictional provision that also operates "to waive sovereign immunity for claims premised on other sources of law (e.g., statutes or contracts)." *United States v. Navajo Nation,* 129 S. Ct. 1547, 1551 (2009).

The three commonly-named sections of the Tucker Act are similar. The Indian Tucker Act, 28 U.S.C. § 1505, the Big Tucker Act, 28 U.S.C. § 1491, and the Little Tucker Act, 28 U.S.C. § 1346(a)(2), each grant the Court of Federal Claims jurisdiction over specific causes of action against the United States. The Indian Tucker Act grants the Court of Federal Claims exclusive jurisdiction over all Indian claims against the United States. 28 U.S.C. § 1505. The Big Tucker Act grants exclusive jurisdiction to the Court of Federal Claims to money claims against the United States exceeding $10,000. *Jarrett v. White*, 57 Fed. App'x. 87, 88 n.1 (3d Cir. 2003). The Little Tucker Act grants concurrent jurisdiction to district courts and the Court of Federal Claims, to money claims against the United States not exceeding $10,000. *Id.* at 88. This court examines cases under the Indian and Big Tucker Acts to help resolve this appeal.

Because the Little Tucker Act operates to waive sovereign immunity, the district court erred in dismissing Bormes' case without considering whether the Little Tucker Act provided an alternative basis for jurisdiction. If the Little Tucker Act authorizes the district court to hear this case, it also provides the waiver of sovereign immunity that the trial court found lacking in the FCRA itself. *See United States v. Mitchell*, 463 U.S. 206, 216 (1983) ("If a claim falls within the terms of the Tucker Act, the United States has presumptively consented to suit.").

To support jurisdiction under the Little Tucker Act, the substantive law that provides the basis for the plaintiff's claims must be "money-mandating." *Fisher v. United States,* 402 F.3d 1167, 1172 (Fed. Cir. 2005). A source of law is money-mandating if it "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *United States v. White Mountain Apache Tribe,* 537 U.S. 465, 472 (2003) (quotation omitted). This "fair interpretation" rule demands a showing "demonstrably lower" than the initial waiver of sovereign immunity: "It is enough . . . that a statute creating a Tucker Act right be reasonably amenable to the reading that it mandates a right of recovery in damages. While the premise to a Tucker Act claim will not be 'lightly inferred,' . . . a fair inference will do." *Id.* In most money-mandating inquiries, the statute at issue clearly imposes duties of some kind on the federal government; the main questions become the extent of those duties and the availability of a money remedy in the event of a breach of those duties.

In *White Mountain*, for example, the act at issue expressly stated that the "'former Fort Apache Military

Reservation' would be 'held by the United States in trust for the White Mountain Apache Tribe.'" 537 U.S. at 469 (quoting Pub. L. 86-392, 74 Stat. 8). The Court was asked whether that trust relationship could be fairly interpreted to subject the government to liability in money damages for failing to preserve the trust property. *Id.* at 475. The Court determined that such an interpretation was fair, relying on "elementary trust law." *Id.*

In *Army and Air Force Exchange Service (AAFES) v. Sheehan*, the Court held AAFES regulations governing separation procedures for certain military post exchange employees did not constitute an express or implied-in-fact contract and thus did not authorize the award of money damages in the event of a Government breach. 456 U.S. 728, 738 (1982). The Court held that "jurisdiction over respondent's complaint cannot be premised on the asserted violation of regulations that do not specifically authorize awards of money damages." *Id.* at 739. Although the Court in *Sheehan* looked for a "specific[] authoriz[ation]" of money damages, 456 U.S. at 739, the Court clarified in *White Mountain* that "an explicit provision for money damages" is not needed in every case. 537 U.S. at 477. Rather, "a fair inference will require an express provision, when the legal current is otherwise against the existence of a cognizable claim." *Id.*

This court often addresses another type of money-mandating question: whether the plaintiff is within the class of plaintiffs entitled to recover under a statute that provides for money damages. Thus, in *Greenlee County, Arizona v. United States*, 487 F.3d 871 (Fed. Cir. 2007), this court confirmed the jurisdiction of the Court of Fed-

eral Claims because the statute at issue provided that "'the Secretary of the Interior *shall make a payment* for each fiscal year to each unit of general local government in which entitlement land is located as set forth in this chapter,'" *id.* at 877 (quoting 31 U.S.C. § 6902(a)(1) (emphasis added)), and the plaintiff had clearly been designated a "unit of general local government." *Id.* Moreover, the court held that the statute clearly mandated money damages because, as "we have repeatedly recognized[,] . . . the use of the word 'shall' generally makes a statute money-mandating." *Id.*

This case poses more difficult questions. Section 1618n [sic] unquestionably provides for money damages. Moreover, the record shows that, at least for jurisdiction, Bormes fits within the class of plaintiffs entitled to recover under the statute. *See Greenlee County*, 487 F.3d at 877 ("[W]here plaintiffs have invoked a money-mandating statute and have made a non-frivolous assertion that they are entitled to relief under the statute, we have held that the Court of Federal Claims has subject-matter jurisdiction over the case.") (quotations omitted)). As discussed below, the government does dispute the adequacy of Bormes's statement of a claim under section 1681c(g)(1). That dispute, however, is not jurisdictional. Instead, this case asks whether the federal government is subject to the damages remedy.

This court refers to the cases above to gain insight into the kind of language that makes a statute money-mandating under the "fair interpretation" standard. Likewise, the government invokes *LeBlanc v. United States*, 50 F.3d 1025 (Fed. Cir. 1995), to support its position. In *LeBlanc*, the plaintiff was a former employee of the government's Defense Contract Administration Ser-

vice. Mr. LeBlanc alleged that he was fired in retaliation for his earlier suit against a government contractor under the False Claims Act. Mr. LeBlanc sued the government for wrongful termination, seeking, among other things, reinstatement and back pay. Mr. LeBlanc contended that the following language from the False Claims Act was money-mandating: "*Any employee* who is discharged . . . by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section . . . shall be entitled to all relief necessary to make the employee whole." *Id.* at 1029 (quoting 31 U.S.C. § 3730(h)) (emphasis added). The court noted, however, that another statute, the Civil Service Reform Act of 1978 (CSRA), "essentially preempted the field" of providing procedural protections for civil service employees faced with adverse personnel actions. *Id.* at 1029. Absent a "clear statement in section 3730(h) of a congressional intent to create a remedy for *federal* employees in addition to those provided in the CSRA," this court declined to interpret the Act to mandate monetary compensation by the federal government for any damages. *Id.* at 1030.

Section 1618n resembles the provisions at issue in *White Mountain* and *Greenlee County* more than those in *Sheehan* or *LeBlanc*. Unlike *LeBlanc*, for example, where the Act gave no indication that the term "any employee" would include federal employees, in this case the Act expressly defines the term "person" to include "any . . . government." § 1681a(b). Similarly, and unlike *Sheehan*, this case does not lack a "specific authorization." Rather, government counsel agreed at oral argument that the reference to "any . . . government" in § 1681a(b)'s definition of "person" refers to the federal

government. Oral Argument at 14:18-15:30 & 18:40-19:07, *available at* http://www.cafc.uscourts.gov/. Indeed, the same attorney, in oral argument before the U.S. Court of Appeals for the Seventh Circuit in the *Talley* case, noted that the definition of "person" in section 1681a(b) "subject[s] the United States to [FCRA's] substantive provisions." Oral Argument at 10:50, *Talley v. U.S. Dep't of Agric.*, 595 F.3d 754 (No. 09-2123), *available at* http://www.ca7.uscourts.gov/. Once this court reads "person" as including the federal government in some provisions, a fair interpretation, based on "elementary" rules of statutory interpretation, *White Mountain*, 537 U.S. at 475, applies the same definition throughout. *See Burgess v. United States*, 553 U.S. 124, 129 (2008) ("Statutory definitions control the meaning of statutory words . . . in the usual case.") (alterations in original; internal quotation marks omitted)). Moreover, as in *Greenlee County*, the Act used the mandatory "shall" in its damages provision—another indication that the law envisions monetary redress for violations. As Chief Judge Easterbrook succinctly stated in the vacated *Talley* opinion, "Congress need not add 'we really mean it!' to make statutes effectual." 595 F.3d at 758.

The government argues that the FCRA cannot be money-mandating because it contains a distinctive grant of jurisdiction to federal district courts. Specifically, section 1681p states, in relevant part, "[a]n action to enforce any liability created under this subchapter may be brought in any appropriate United States district court, without regard to the amount in controversy, or in any other court of competent jurisdiction." The government relies on this court's opinion in *Blueport Co. v. United States*, which, in the context of holding that the Digital Millennium Copyright Act (DMCA) is not

money-mandating, stated that "the CFC lacks jurisdiction to adjudicate claims created by statutes, like the DMCA, which specifically authorize jurisdiction in the district courts." 533 F.3d 1374, 1384 (2008).

Blueport does not control in this case. Because the Big Tucker Act and Little Tucker Act follow the same rules, this court may ask if *Blueport* would prevent the Court of Federal Claims from exercising jurisdiction if Bormes had initiated his case in that court. If *Blueport* would block jurisdiction in the Court of Federal Claims under the Big Tucker Act, then it would also prevent a district court from exercising jurisdiction (and finding the concomitant waiver of sovereign immunity) in the Little Tucker Act. This court need not, however, reach that conclusion.

Blueport does not apply because the jurisdictional grant in FCRA is not "like the DMCA." *Id.* Instead, the former grants jurisdiction to "any appropriate United States district court, without regard to the amount in controversy, or *in any other court of competent jurisdiction.*" 15 U.S.C. § 1681p (emphasis added).

The government asserts that "any other court of competent jurisdiction" refers to state court jurisdiction rather than other federal tribunals. The government explains that the Supreme Court interpreted the phrase "any other court of competent jurisdiction" as "provid[ing] for concurrent federal-court and state-court jurisdiction over civil liability suits." *Bank One Chicago N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 268, 275 (1996). The government also argues because the FCRA grants jurisdiction to federal courts without regard to the amount in controversy, it could not have intended to grant jurisdiction to the Court of Federal

Claims, because the Tucker Act grants jurisdiction to the Court of Federal Claims only for claims over $10,000.

Moreover, FCRA initially contained an amount-in-controversy requirement for federal-question suits as well as diversity suits. That amount-in-controversy requirement thus explains the jurisdictional grant in the FCRA to district courts "without regard to the amount in controversy," for without that language, FCRA claims below the amount-in-controversy requirement would have been relegated to state courts.

In 1980, however, the jurisdictional minimum for federal-question cases was rescinded. Section 2(a) of Pub. L. 96-486, 94 Stat. 2369 (1980). If the "amount in controversy" language is to retain meaning, the government argues, it should now refer to the amount-in-controversy requirement that distinguishes Big Tucker Act from Little Tucker Act cases and should indicate that Congress meant to take suits for over $10,000 out of the CFC's jurisdiction, and thus out of the scope of the Tucker Act.

We conclude that the Court of Federal Claims is a court of competent jurisdiction for purposes of this statute. As the motions panel in this case noted, "[t]he Court [in *Bank One*] did not state . . . that federal courts other than the district courts would not also have concurrent jurisdiction over such cases." 2010 WL 331771, at *2. Moreover, this court will not hold that the Act impliedly repealed the jurisdictional grant of the Tucker Act for enforcement of FCRA rights simply because the FCRA does not contain an amount-in-controversy requirement. *See Preseault v. ICC*, 494 U.S. 1, 12 (1990) ("Congress did not exhibit the type of

'unambiguous intention to withdraw the Tucker Act remedy that is necessary to preclude a Tucker Act claim.") (internal quotations and citations omitted)).

As discussed, a fair interpretation of FCRA mandates money damages from the federal government for damages. This conclusion withstands an attack based on arguments about an "express" waiver of sovereign immunity in FCRA. As discussed earlier, the test for a money-mandating statute is less stringent than the test for a waiver of sovereign immunity in the same statute.

In this connection, this court notes that the 1996 and 2003 amendments subjected "persons" who print receipts to liability. Of course, under FCRA's unique definition of "person," a sovereign, namely the United States, would also face potential liability. *See USPS v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 745-46 (2004). Thus, a question arises about the sufficiency of this waiver and the particular clarity needed to infer a waiver of sovereign immunity when considering statutory amendments that change the ordinary meaning of preexisting provisions. *See Emp's of the Dep't of Public Health & Welfare v. Dep't of Public Health & Welfare*, 411 U.S. 279 (1973). Whatever strength this argument has in considering the sufficiency of FCRA's waiver of sovereign immunity, it is not compelling in the context of determining FCRA's mandate of money damages.

This court is also aware that FCRA provides for punitive and criminal punishment, which cannot be imposed upon the government under the Tucker Act. *See Brown v. United States*, 105 F.3d 621, 623 (Fed. Cir. 1997) (holding that Tucker Act is "limited to cases in which the Constitution or a federal statute requires the payment of money damages *as compensation for their*

violation") (emphasis added)). This limitation on Tucker Act remedies does not mean that FCRA is not money-mandating. Rather this limitation means that FCRA's money-mandating provisions do not extend beyond certain types of claims, such as those at issue in this case. *See Talley*, 595 F.3d at 761("As we see things . . . [the government's argument] means only that punitive damages are unavailable against the United States unless the Tucker Act authorizes them.").

Similarly, FCRA permits recovery for negligence, but the Tucker Act does not permit negligence claims. *See Rick's Mushroom Serv. v. United States*, 521 F.3d 1338, 1343 (Fed. Cir. 2008). As the vacated opinion in *Talley* also noted, however, a negligence claim is different than a statutory claim that includes an element which is analyzed under a negligence standard. 595 F.3d at 761.

In addition, a separate FCRA provision expressly provides for remedies against the United States. Specifically, section 1681u requires consumer reporting agencies to furnish consumer credit information to the Federal Bureau of Investigation, but limits the FBI's response tools. In imposing liability on "[a]ny agency or department of the United States," FCRA limits statutory damages to $100 and provides actual and punitive damages. 15 U.S.C. § 1681u(i). With respect to this language, the government argues that Congress knew how to subject the United States to damages when it wanted to do so. To the contrary, however, this provision shows only that Congress presumably needed to create a different remedial scheme in section 1681u because that section specifically limits what the government can do with credit information. This different scheme does not

mean that the Act did not speak broadly enough to include the United States when it prohibited certain "persons" from use of credit information.

Finally, the government argues that different statutes of limitations govern Tucker Act claims and FCRA claims. Under section 1681p, a FCRA action must be commenced either two years after the plaintiff discovers the violation, or within five years after the date on which the alleged FCRA violation occurs. In contrast, a default six year statute of limitations applies to Tucker Act claims. 28 U.S.C. § 2401(a). The vacated *Talley* opinion convincingly dealt with this argument as well, noting that "different statutes of limitations are common in federal practice, and the rule is that the more specific limit prevails, not that a short limit cancels out any substantive statute." 595 F.3d at 760 (citing *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1 (2008)). This court adopts the same reasoning in support of the statutory language and context that makes the FCRA money-mandating.

IV

The parties have also briefed whether Bormes' claim should be dismissed for failure to state a claim upon which relief can be granted. Specifically, the government contends that the alleged wrongful action in this case—providing credit card information that is displayed on a consumer's computer screen—does not qualify as a willful violation of 15 U.S.C. § 1681c(g)(1), which requires "print[ing] more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction."

Whether a case must be dismissed under Rule 12(b)(6) is a question of law that this court may answer in the first instance. *See* Fed. R. Civ. P. 12(b)(6) advisory committee's note; *Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States*, 48 F.3d 1166, 1170 (Fed. Cir. 1995) (determining whether a complaint was properly dismissed under Rule 12(b)(6) is a question of law that the court reviews independently); *see also Thompson v. Microsoft Corp.*, 471 F.3d 1288, 1291 (Fed. Cir. 2006) (addressing a question of law regarding jurisdiction in the first instance). Nonetheless, the government, both in its brief and at oral argument, asked this court for the opportunity to fully develop its Rule 12(b)(6) arguments before the district court. This court decides to give weight to the moving party's preference in this case, and will allow the district court to consider first the government's motion to dismiss on that additional ground, as well as any others that have not been waived. Thus, this court vacates the judgment and remands for further proceedings.

VACATED AND REMANDED

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 2009-1546

JAMES X. BORMES, INDIVIDUALLY AND ON BEHALF OF ALL OTHER SIMILARLY SITUATED, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Filed: Jan. 27, 2010

ON MOTION

ORDER

Before: NEWMAN, FRIEDMAN and LOURIE, *Circuit Judges*.

FRIEDMAN, *Circuit Judge*.

The United States has moved to transfer this case to the United States Court of Appeals for the Seventh Cir-

cuit, on the ground that it, and not this court, has jurisdiction over this appeal. We conclude, however, that this court has jurisdiction, and therefore deny the transfer motion.

I

The appellant James X. Bormes, "individually and on behalf of all others similarly situated," filed this suit in the United States District Court for the Northern District of Illinois seeking statutory damages from the United States for its alleged violation of the Fair Credit Reporting Act ("Reporting Act"), 15 U.S.C. § 1681 *et seq.* He contends that the United States violated that Act by including credit card expiration dates on confirmation pages for payment of court filing fees through the government's www.pay.gov system. On the government's motion, the district court dismissed the complaint because, in the Reporting Act, the United States did not waive its sovereign immunity from such a suit.

Bormes appealed the dismissal to this court. The government moved to transfer the case to the Court of Appeals for the Seventh Circuit.

II

Under 28 U.S.C. § 1295(a)(2), this court has exclusive jurisdiction "of an appeal from a final decision of a district court of the United States . . . if the jurisdiction of that court was based, in whole or in part, on section 1346 of this title." Section 1346 tracks the Tucker Act, which defines the jurisdiction of the Court of Federal Claims. 28 U.S.C. § 1491(a)(1). Known as the Little Tucker Act, § 1346 gives the district courts jurisdiction, concurrent with the Court of Federal Claims, of "any other [than tax refund] civil action or claim against the

United States, not exceeding $10,000 in amount, founded . . . upon any Act of Congress." Bormes' complaint invoked the district court's jurisdiction under the Little Tucker Act.

The Reporting Act states that "[a]ny person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount [not exceeding actual damages of $1,000 plus punitive damages and attorney's fees]." 15 U.S.C. § 1681n(a). The jurisdictional provision of that Act governing suits for violation provides in part:

> An action to enforce any liability created under this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction.

15 U.S.C. § 1681p.

On their face, these provisions appear to give this court jurisdiction over this appeal. The jurisdiction of the district court was founded upon an Act of Congress. The Reporting Act authorizes suits "in any appropriate" district court ("without regard to the amount in controversy") "or in any other court of competent jurisdiction" "to enforce any liability created under this subchapter." The complaint alleges a monetary claim against the United States for the government's alleged violation of that Act.

The government points to the statement in *Blueport Co. v. United States,* 533 F.3d 1374 (Fed. Cir. 2008), that the Court of Federal Claims "lacks jurisdiction to adjudicate claims created by statutes . . . which specifically

authorize jurisdiction in the district courts." 533 F.3d at 1384. It contends that the Reporting Act is such a statute; that under *Blueport* the Court of Federal Claims would not have had jurisdiction over this case; that because of the parallellism of the Main and Little Tucker Acts, the district court's jurisdiction over this case did not rest on the Little Tucker Act; and that this court therefore does not have jurisdiction over the appeal from the district court's judgment.

The conclusion, however, does not follow from the premises. If this suit had been brought in the Court of Federal Claims, any appeal in that case, including a challenge to that court's dismissal of the case on the same ground the district court gave, would have been to this court, not to the Seventh Circuit. 28 U.S.C. § 1295(a)(3); *Blueport,* 533 F.3d at 1378. It would seem anomalous if we would have jurisdiction over an appeal from the dismissal of such suit brought in the Court of Federal Claims, but the Seventh Circuit would have jurisdiction over an appeal from the dismissal of an identical suit brought in the district court. Indeed, even if the Court of Federal Claims would not have had jurisdiction over this suit, it does not necessarily follow that this court would lack jurisdiction over the appeal from the district court's dismissal of this suit.

Blueport was an appeal to this court from an order of the Court of Federal Claims dismissing a copyright infringement suit against the United States because the government had not waived its sovereign immunity. The *Blueport* statement upon which the government relies relates to the jurisdiction of the Court of Federal Claims, and there was no question that this court had jurisdiction to review that court's decision. The question

in the present case, however, is whether this court has jurisdiction to review the district court's decision—an issue *Blueport* did not address.

Moreover, even under the *Blueport* standard quoted above, it is unclear whether the Court of Federal Claims would have had jurisdiction over this suit. The Reporting Act gives jurisdiction over suits thereunder not only to "any appropriate district court" but also to "any other court of competent jurisdiction." Would the Court of Federal Claims be such a court?

The Supreme Court has viewed similar phraseology in a different statute—"Any action under this section may be brought in any United States district court or in any other court of competent jurisdiction"—as "provid[ing] for concurrent federal-court and state-court jurisdiction over civil liability suits." *Bank One Chicago N.A. v. Midwest Bank & Trust Co.,* 516 U.S. 264, 268, 275, 116 S. Ct. 637, 133 L. Ed. 2d 635 (1996). The Court did not state, however, that federal courts other than the district courts would not also have concurrent jurisdiction over such cases. It may be, however, that because the district courts have jurisdiction under the Reporting Act "without regard to the amount in controversy," there was no occasion to give concurrent jurisdiction to the Court of Federal Claims over cases in which the amount in controversy exceeds the $10,000 limitation in the Little Tucker Act.

The issue is close but on balance we conclude that this court has jurisdiction over this appeal.

The motion to transfer this case to the Court of Appeals for the Seventh Circuit is DENIED. The United States' brief is due within 40 days of the date of filing of this order.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 08-C-7409

JAMES X. BORMES, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Filed: July 24, 2009

MEMORANDUM OPINION

CHARLES R. NORGLE, District Judge.

Before the Court is Defendant United States of America's Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State a Claim Upon Which Relief May Be Granted. For the following reasons, the Motion is granted.

I. BACKGROUND

In his Class Action Complaint, Plaintiff James X. Bormes ("Bormes") alleges the following facts. In October 2000, Defendant United States of America (the "United States" or the "Government"), through the United States Department of the Treasury's Financial Management Service, launched Pay.gov, an internet-based billing and payment processing system that allows consumers to make online payments to various government agencies by credit or debit card. Numerous Government agencies utilize Pay.gov to process online credit and debit card payments, including: the Department of Agriculture, the Department of Education, the Department of Health and Human Services, the Department of the Treasury, the Library of Congress, the National Park Foundation, the Social Security Administration, and the United States District Courts.

On or about August 9, 2008, Bormes, an attorney, filed a lawsuit on behalf of one of his clients in the Northern District of Illinois using its online CM/ECF document filing system. Bormes paid the filing fee using his American Express credit card, and the transaction was processed through the Government's Pay.gov system. The Government then provided Bormes with a confirmation webpage displayed on Bormes' computer screen. Bormes printed copies of the confirmation page for his records. The confirmation page and printed copies of it contained the last four digits of Bormes' credit card number, along with the card's expiration date. Bormes alleges that the inclusion of his card's expiration date violates the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 et seq., as amended by the Fair and

Accurate Credit Transaction Act. That statute provides, in pertinent part:

> Except as otherwise provided in this subsection, no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction.

15 U.S.C. § 1681c(g)(1).

Bormes purports to bring this action on behalf of himself and a class of individual cardholders who were provided electronically printed receipts from the Government on or after June 4, 2008, where the receipt displayed more than the last five digits of the cardholder's credit or debit card number and/or the expiration date of the card. He seeks, *inter alia,* statutory damages, attorneys' fees, and costs.

The United States filed its Motion to Dismiss on May 1, 2009. The Motion is fully briefed and before the Court.

II. DISCUSSION

A. Standard of Decision

The Court first notes that the Government styles its Motion to Dismiss as one brought in part for lack of subject-matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1), based on the sovereign immunity of the United States. Older case law supports the Government's position that sovereign immunity is a jurisdictional issue. *United States v. Mitchell,* 445 U.S. 535, 538 (1980) ("It is elementary that '[the] United States, as sovereign, is immune from suit save as it con-

sents to be sued . . . , and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'") (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)); *Bartley v. United States*, 123 F.3d 466, 467 (7th Cir. 1997).

The Seventh Circuit, however, has recently interpreted newer Supreme Court precedent to indicate that the principle of sovereign immunity cannot divest District Courts of the power to adjudicate a case. "[W]hat sovereign immunity means is that relief against the United States depends on a statute; the question is not the competence of the court to render a binding judgment, but the propriety of interpreting a given statute to allow particular relief." *Parrott v. United States,* 536 F.3d 629, 634 (7th Cir. 2008) (citing *Irwin v. Dept. of Veteran Affairs*, 498 U.S. 89, 93-96 (1990) and *McNeil v. United States*, 508 U.S. 106, 112 (1993)). Under the more current case law, the Court therefore finds that it has jurisdiction over this suit brought pursuant to federal statute.[1]

The dispositive issue thus becomes whether Bormes is entitled to seek relief under the FCRA on the facts he has alleged. *See Schleicher v. Salvation Army*, 518 F.3d 472, 478 (7th Cir. 2008) ("The district judge made one mistake, though a harmless one. That was to dismiss the suit under Rule 12(b)(1) of the civil rules. That rule is intended for cases not within the jurisdiction of the district court . . . Jurisdiction is determined by what the plaintiff claims rather than by what may come into the litigation by way of defense.") (internal citation omit-

[1] Bormes' assertion that the Little Tucker Act provides the Court with jurisdiction over this matter is therefore moot.

ted); *Frey v. EPA*, 270 F.3d 1129, 1132-33 (7th Cir. 2001) (explaining that certain provisions restrict a federal court's power to adjudicate matters, while other provisions merely set limits on a plaintiff's right to recover). Despite its label, the Court therefore construes the Government's Motion as brought entirely under Rule 12(b)(6), for failure to state a claim.

In deciding a Rule 12(b)(6) motion, the Court accepts all well-pleaded facts as true, and draws all reasonable inferences in favor of the plaintiff. *See, e.g., Jackson v. E.J. Brach Corp.*, 176 F.3d 971, 977-78 (7th Cir. 1999). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims . . . Rule 12(b)(6) should be employed only when the complaint does not present a legal claim." *Smith v. Cash Store Mgmt. Inc.*, 195 F.3d 325, 327 (7th Cir. 1999); *Leatherman v. Tarrant County*, 507 U.S. 163, 168 (1993); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002). The Court recognizes, however, that the "old formula—that the complaint must not be dismissed unless it is beyond doubt without merit—was discarded by the *Bell Atlantic* decision." *Limestone Dev. Corp. v. Vill. of Lamont*, 520 F.3d 797, 803 (7th Cir. 2008) (citing *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007)). Following *Bell Atlantic,* a complaint will survive a motion to dismiss only when the complaint "contains enough detail, factual or argumentative, to indicate that the plaintiff has a substantial case." *Limestone Dev. Corp.*, 520 F.3d at 802-03.

B. The Government's Motion to Dismiss

The well-established doctrine of sovereign immunity protects the United States from suit except where Con-

gress has "unequivocally expressed" a waiver of immunity. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992); *Automatic Sprinkler Corp. of America v. Darla Environmental Specialists, Inc.*, 53 F.3d 181, 182 (7th Cir. 1995) ("The principle of governmental immunity is simple: anyone who seeks money from the Treasury needs a statute authorizing that relief."). "A waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *Mitchell*, 445 U.S. at 538 (quoting *United States v. King*, 395 U.S. 1, 4 (1969)).

Keeping these principles in mind, the Court will inquire as to whether the FCRA unequivocally expresses a waiver of sovereign immunity. The Court turns first to the FCRA's express language. The FCRA imposes liability on "any person" who willfully fails to comply with its provisions. 15 U.S.C. § 1681n(a). That statute defines a "person" as "any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity." *Id.* at § 1681a(b).

Bormes asserts that the FCRA's inclusion of the generic term "government" effectively waives the United States' sovereign immunity. The Court disagrees. As the Government correctly points out, other federal statues have unequivocally waived the United States' sovereign immunity by expressly inserting the specific term "United States" into the statutory language. For example, the Federal Torts Claims Act authorizes "claims against the *United States,* for money damages . . . for injury or loss of properly . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or

employment." 28 U.S.C. § 1346(b)(1) (emphasis added); see also 28 U.S.C. § 2409a(a) ("The *United States* may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest. . . . ") (emphasis added). In fact, a separate section of the FCRA expressly provides that the United States may be liable for certain violations. "Any agency or department of the *United States* obtaining or disclosing any consumer reports, records, or information contained therein in violation of this section is liable to the consumer. . . . " 15 U.S.C. § l681u(i) (emphasis added). These statutes have clearly and unambiguously waived the sovereign immunity of the United States. *See Lane v. Pena*, 518 U.S. 187, 192 (1996) ("A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied.") (internal citations omitted). Because the section of the FCRA under which Bormes seeks relief, 15 U.S.C. § 1681n, has not so unequivocally waived the sovereign immunity of the United States, Bormes fails to present a claim under which relief can be granted. *See Limestone Dev. Corp.*, 520 F.3d at 802-03. As the Court finds the issue of sovereign immunity dispositive of the Government's Motion to Dismiss, the Court does not reach the Government's alternative assertions in support of its Motion.

III. CONCLUSION

For the foregoing reasons, the United States' Motion to Dismiss is granted. IT IS SO ORDERED.

ENTER:

/s/ CHARLES R. NORGLE
CHARLES RONALD NORGLE, Judge
United States District Court

Dated: July 24, 2009

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Case No. 2009-1546

JAMES X. BORMES, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: Mar. 15, 2011]

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Appellee, and a response thereto having been invited by the court and filed by the Appellant, and the petition for rehearing and response, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on March 22, 2011.

FOR THE COURT,

/s/ JAN HORBALY
JAN HORBALY
Clerk

Dated: 03/15/2011

cc: John G. Jacobs
Henry C. Whitaker

APPENDIX E

1. 15 U.S.C. 1681a provides:

Definitions; rules of construction

(a) Definitions and rules of construction set forth in this section are applicable for the purposes of this subchapter.

(b) The term "person" means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

(c) The term "consumer" means an individual.

(d) CONSUMER REPORT.—

(1) IN GENERAL.—The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness,[1] credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for—

(A) credit or insurance to be used primarily for personal, family, or household purposes;

(B) employment purposes; or

(C) any other purpose authorized under section 1681b of this title.

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[1] So in original. Probably should be "creditworthiness."

(2) EXCLUSIONS.—Except as provided in paragraph (3), the term "consumer report" does not include—

(A) subject to section 1681s-3 of this title, any—

(i) report containing information solely as to transactions or experiences between the consumer and the person making the report;

(ii) communication of that information among persons related by common ownership or affiliated by corporate control; or

(iii) communication of other information among persons related by common ownership or affiliated by corporate control, if it is clearly and conspicuously disclosed to the consumer that the information may be communicated among such persons and the consumer is given the opportunity, before the time that the information is initially communicated, to direct that such information not be communicated among such persons;

(B) any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device;

(C) any report in which a person who has been requested by a third party to make a specific extension of credit directly or indirectly to a consumer conveys his or her decision with respect to such request, if the third party advises the consumer of the name and address of the person to whom the request was made, and such person makes the disclosures to the consumer required under section 1681m of this title; or

(D) a communication described in subsection (*o*) or (x) of this section.

(3) RESTRICTION ON SHARING OF MEDICAL INFORMATION.—Except for information or any communication of information disclosed as provided in section 1681b(g)(3) of this title, the exclusions in paragraph (2) shall not apply with respect to information disclosed to any person related by common ownership or affiliated by corporate control, if the information is—

(A) medical information;

(B) an individualized list or description based on the payment transactions of the consumer for medical products or services; or

(C) an aggregate list of identified consumers based on payment transactions for medical products or services.

(e) The term "investigative consumer report" means a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information. However, such information shall not include specific factual information on a consumer's credit record obtained directly from a creditor of the consumer or from a consumer reporting agency when such information was obtained directly from a creditor of the consumer or from the consumer.

(f) The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

(g) The term "file", when used in connection with information on any consumer, means all of the information on that consumer recorded and retained by a consumer reporting agency regardless of how the information is stored.

(h) The term "employment purposes" when used in connection with a consumer report means a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee.

(i) MEDICAL INFORMATION.—The term "medical information"—

(1) means information or data, whether oral or recorded, in any form or medium, created by or derived from a health care provider or the consumer, that relates to—

(A) the past, present, or future physical, mental, or behavioral health or condition of an individual;

(B) the provision of health care to an individual; or

(C) the payment for the provision of health care to an individual.[2]

(2) does not include the age or gender of a consumer, demographic information about the consumer, including a consumer's residence address or e-mail address, or any other information about a consumer that does not relate to the physical, mental, or behavioral health or condition of a consumer, including the existence or value of any insurance policy.

(j) DEFINITIONS RELATING TO CHILD SUPPORT OBLIGATIONS.—

(1) OVERDUE SUPPORT.—The term "overdue support" has the meaning given to such term in section 666(e) of title 42.

(2) STATE OR LOCAL CHILD SUPPORT ENFORCEMENT AGENCY.—The term "State or local child support enforcement agency" means a State or local agency which administers a State or local program for establishing and enforcing child support obligations.

(k) ADVERSE ACTION.—

(1) ACTIONS INCLUDED.—The term "adverse action"—

(A) has the same meaning as in section 1691(d)(6) of this title; and

(B) means—

(i) a denial or cancellation of, an increase in any charge for, or a reduction or other adverse

[2] So in original. The period probably should be "; and".

or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance;

(ii) a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee;

(iii) a denial or cancellation of, an increase in any charge for, or any other adverse or unfavorable change in the terms of, any license or benefit described in section 1681b(a)(3)(D) of this title; and

(iv) an action taken or determination that is—

(I) made in connection with an application that was made by, or a transaction that was initiated by, any consumer, or in connection with a review of an account under section 1681b(a)(3)(F)(ii) of this title; and

(II) adverse to the interests of the consumer.

(2) APPLICABLE FINDINGS, DECISIONS, COMMENTARY, AND ORDERS.—For purposes of any determination of whether an action is an adverse action under paragraph (1)(A), all appropriate final findings, decisions, commentary, and orders issued under section 1691(d)(6) of this title by the Board of Governors of the Federal Reserve System or any court shall apply.

(*l*) FIRM OFFER OF CREDIT OR INSURANCE.—The term "firm offer of credit or insurance" means any offer of credit or insurance to a consumer that will be honored if the consumer is determined, based on information in a consumer report on the consumer, to meet the specific criteria used to select the consumer for the offer, except that the offer may be further conditioned on one or more of the following:

(1) The consumer being determined, based on information in the consumer's application for the credit or insurance, to meet specific criteria bearing on credit worthiness[3] or insurability, as applicable, that are established—

(A) before selection of the consumer for the offer; and

(B) for the purpose of determining whether to extend credit or insurance pursuant to the offer.

(2) Verification—

(A) that the consumer continues to meet the specific criteria used to select the consumer for the offer, by using information in a consumer report on the consumer, information in the consumer's application for the credit or insurance, or other information bearing on the credit worthiness or insurability of the consumer; or

(B) of the information in the consumer's application for the credit or insurance, to determine that the consumer meets the specific criteria bearing on credit worthiness or insurability.

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[3] So in original. Probably should be "creditworthiness".

(3) The consumer furnishing any collateral that is a requirement for the extension of the credit or insurance that was—

(A) established before selection of the consumer for the offer of credit or insurance; and

(B) disclosed to the consumer in the offer of credit or insurance.

(m) CREDIT OR INSURANCE TRANSACTION THAT IS NOT INITIATED BY THE CONSUMER.—The term "credit or insurance transaction that is not initiated by the consumer" does not include the use of a consumer report by a person with which the consumer has an account or insurance policy, for purposes of—

(1) reviewing the account or insurance policy; or

(2) collecting the account.

(n) STATE.—The term "State" means any State, the Commonwealth of Puerto Rico, the District of Columbia, and any territory or possession of the United States.

(*o*) EXCLUDED COMMUNICATIONS.—A communication is described in this subsection if it is a communication—

(1) that, but for subsection (d)(2)(D) of this section, would be an investigative consumer report;

(2) that is made to a prospective employer for the purpose of—

(A) procuring an employee for the employer; or

(B) procuring an opportunity for a natural person to work for the employer;

(3) that is made by a person who regularly performs such procurement;

(4) that is not used by any person for any purpose other than a purpose described in subparagraph (A) or (B) of paragraph (2); and

(5) with respect to which—

(A) the consumer who is the subject of the communication—

(i) consents orally or in writing to the nature and scope of the communication, before the collection of any information for the purpose of making the communication;

(ii) consents orally or in writing to the making of the communication to a prospective employer, before the making of the communication; and

(iii) in the case of consent under clause (i) or (ii) given orally, is provided written confirmation of that consent by the person making the communication, not later than 3 business days after the receipt of the consent by that person;

(B) the person who makes the communication does not, for the purpose of making the communication, make any inquiry that if made by a prospective employer of the consumer who is the subject of the communication would violate any applicable Federal or State equal employment opportunity law or regulation; and

(C) the person who makes the communication—

(i) discloses in writing to the consumer who is the subject of the communication, not later than 5 business days after receiving any request from the consumer for such disclosure, the nature and substance of all information in the consumer's file at the time of the request, except that the sources of any information that is acquired solely for use in making the communication and is actually used for no other purpose, need not be disclosed other than under appropriate discovery procedures in any court of competent jurisdiction in which an action is brought; and

(ii) notifies the consumer who is the subject of the communication, in writing, of the consumer's right to request the information described in clause (i).

(p) CONSUMER REPORTING AGENCY THAT COMPILES AND MAINTAINS FILES ON CONSUMERS ON A NATIONWIDE BASIS.—The term "consumer reporting agency that compiles and maintains files on consumers on a nationwide basis" means a consumer reporting agency that regularly engages in the practice of assembling or evaluating, and maintaining, for the purpose of furnishing consumer reports to third parties bearing on a consumer's credit worthiness[4], credit standing, or credit capacity, each of the following regarding consumers residing nationwide:

(1) Public record information.

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[4] So in original. Probably should be "creditworthiness".

(2) Credit account information from persons who furnish that information regularly and in the ordinary course of business.

(q) DEFINITIONS RELATING TO FRAUD ALERTS.—

(1) ACTIVE DUTY MILITARY CONSUMER.—The term "active duty military consumer" means a consumer in military service who—

(A) is on active duty (as defined in section 101(d)(1) of title 10) or is a reservist performing duty under a call or order to active duty under a provision of law referred to in section 101(a)(13) of title 10; and

(B) is assigned to service away from the usual duty station of the consumer.

(2) FRAUD ALERT; ACTIVE DUTY ALERT.—The terms "fraud alert" and "active duty alert" mean a statement in the file of a consumer that—

(A) notifies all prospective users of a consumer report relating to the consumer that the consumer may be a victim of fraud, including identity theft, or is an active duty military consumer, as applicable; and

(B) is presented in a manner that facilitates a clear and conspicuous view of the statement described in subparagraph (A) by any person requesting such consumer report.

(3) IDENTITY THEFT.—The term "identity theft" means a fraud committed using the identifying information of another person, subject to such further definition as the Commission may prescribe, by regulation.

(4) IDENTITY THEFT REPORT.—The term "identity theft report" has the meaning given that term by rule of the Commission, and means, at a minimum, a report—

(A) that alleges an identity theft;

(B) that is a copy of an official, valid report filed by a consumer with an appropriate Federal, State, or local law enforcement agency, including the United States Postal Inspection Service, or such other government agency deemed appropriate by the Commission; and

(C) the filing of which subjects the person filing the report to criminal penalties relating to the filing of false information if, in fact, the information in the report is false.

(5) NEW CREDIT PLAN.—The term "new credit plan" means a new account under an open end credit plan (as defined in section 1602(i) of this title) or a new credit transaction not under an open end credit plan.

(r) CREDIT AND DEBIT RELATED TERMS.—

(1) CARD ISSUER.—The term "card issuer" means—

(A) a credit card issuer, in the case of a credit card; and

(B) a debit card issuer, in the case of a debit card.

(2) CREDIT CARD.—The term "credit card" has the same meaning as in section 1602 of this title.

(3) DEBIT CARD.—The term "debit card" means any card issued by a financial institution to a consumer for use in initiating an electronic fund transfer from the account of the consumer at such financial institution, for the purpose of transferring money between accounts or obtaining money, property, labor, or services.

(4) ACCOUNT AND ELECTRONIC FUND TRANSFER.—The terms "account" and "electronic fund transfer" have the same meanings as in section 1693a of this title.

(5) CREDIT AND CREDITOR.—The terms "credit" and "creditor" have the same meanings as in section 1691a of this title.

(s) FEDERAL BANKING AGENCY.—The term "Federal banking agency" has the same meaning as in section 1813 of title 12.

(t) FINANCIAL INSTITUTION.—The term "financial institution" means a State or National bank, a State or Federal savings and loan association, a mutual savings bank, a State or Federal credit union, or any other person that, directly or indirectly, holds a transaction account (as defined in section 461(b) of title 12) belonging to a consumer.

(u) RESELLER.—The term "reseller" means a consumer reporting agency that—

(1) assembles and merges information contained in the database of another consumer reporting agency or multiple consumer reporting agencies concerning any consumer for purposes of furnishing such information to any third party, to the extent of such activities; and

(2) does not maintain a database of the assembled or merged information from which new consumer reports are produced.

(v) COMMISSION.—The term "Commission" means the Federal Trade Commission.

(w) NATIONWIDE SPECIALTY CONSUMER REPORTING AGENCY.—The term "nationwide specialty consumer reporting agency" means a consumer reporting agency that compiles and maintains files on consumers on a nationwide basis relating to—

(1) medical records or payments;

(2) residential or tenant history;

(3) check writing history;

(4) employment history; or

(5) insurance claims.

(x) EXCLUSION OF CERTAIN COMMUNICATIONS FOR EMPLOYEE INVESTIGATIONS.—

(1) COMMUNICATIONS DESCRIBED IN THIS SUBSECTION.—A communication is described in this subsection if—

(A) but for subsection (d)(2)(D) of this section, the communication would be a consumer report;

(B) the communication is made to an employer in connection with an investigation of—

(i) suspected misconduct relating to employment; or

(ii) compliance with Federal, State, or local laws and regulations, the rules of a self-regulatory organization, or any preexisting written policies of the employer;

(C) the communication is not made for the purpose of investigating a consumer's credit worthiness,[5] credit standing, or credit capacity; and

(D) the communication is not provided to any person except—

(i) to the employer or an agent of the employer;

(ii) to any Federal or State officer, agency, or department, or any officer, agency, or department of a unit of general local government;

(iii) to any self-regulatory organization with regulatory authority over the activities of the employer or employee;

(iv) as otherwise required by law; or

(v) pursuant to section 1681f of this title.

(2) SUBSEQUENT DISCLOSURE.—After taking any adverse action based in whole or in part on a communication described in paragraph (1), the employer shall disclose to the consumer a summary containing

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[5] So in original. Probably should be "creditworthiness,".

the nature and substance of the communication upon which the adverse action is based, except that the sources of information acquired solely for use in preparing what would be but for subsection (d)(2)(D) of this section an investigative consumer report need not be disclosed.

(3) SELF-REGULATORY ORGANIZATION DEFINED.—For purposes of this subsection, the term "self-regulatory organization" includes any self-regulatory organization (as defined in section 78c(a)(26) of this title), any entity established under title I of the Sarbanes-Oxley Act of 2002 [15 U.S.C. 7211 et seq.], any board of trade designated by the Commodity Futures Trading Commission, and any futures association registered with such Commission.

2. 15 U.S.C. 1681b (2006 & Supp. III 2009) provides:

Permissible purposes of consumer reports

(a) In general

Subject to subsection (c) of this section, any consumer reporting agency may furnish a consumer report under the following circumstances and no other:

(1) In response to the order of a court having jurisdiction to issue such an order, or a subpoena issued in connection with proceedings before a Federal grand jury.

(2) In accordance with the written instructions of the consumer to whom it relates.

(3) To a person which it has reason to believe—

(A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or

(B) intends to use the information for employment purposes; or

(C) intends to use the information in connection with the underwriting of insurance involving the consumer; or

(D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

(E) intends to use the information, as a potential investor or servicer, or current insurer, in connection with a valuation of, or an assessment of the credit or prepayment risks associated with, an existing credit obligation; or

(F) otherwise has a legitimate business need for the information—

(i) in connection with a business transaction that is initiated by the consumer; or

(ii) to review an account to determine whether the consumer continues to meet the terms of the account.

(G) executive departments and agencies in connection with the issuance of government-sponsored individually-billed travel charge cards.

(4) In response to a request by the head of a State or local child support enforcement agency (or a State or local government official authorized by the head of such an agency), if the person making the request certifies to the consumer reporting agency that—

(A) the consumer report is needed for the purpose of establishing an individual's capacity to make child support payments or determining the appropriate level of such payments;

(B) the paternity of the consumer for the child to which the obligation relates has been established or acknowledged by the consumer in accordance with State laws under which the obligation arises (if required by those laws);

(C) the person has provided at least 10 days' prior notice to the consumer whose report is requested, by certified or registered mail to the last known address of the consumer, that the report will be requested; and

(D) the consumer report will be kept confidential, will be used solely for a purpose described in subparagraph (A), and will not be used in connection with any other civil, administrative, or criminal proceeding, or for any other purpose.

(5) To an agency administering a State plan under section 654 of title 42 for use to set an initial or modified child support award.

(6) To the Federal Deposit Insurance Corporation or the National Credit Union Administration as part of its preparation for its appointment or as part of its exercise of powers, as conservator, receiver, or

liquidating agent for an insured depository institution or insured credit union under the Federal Deposit Insurance Act [12 U.S.C. 1811 et seq.] or the Federal Credit Union Act [12 U.S.C. 1751 et seq.], or other applicable Federal or State law, or in connection with the resolution or liquidation of a failed or failing insured depository institution or insured credit union, as applicable.

(b) Conditions for furnishing and using consumer reports for employment purposes

(1) Certification from user

A consumer reporting agency may furnish a consumer report for employment purposes only if—

(A) the person who obtains such report from the agency certifies to the agency that—

(i) the person has complied with paragraph (2) with respect to the consumer report, and the person will comply with paragraph (3) with respect to the consumer report if paragraph (3) becomes applicable; and

(ii) information from the consumer report will not be used in violation of any applicable Federal or State equal employment opportunity law or regulation; and

(B) the consumer reporting agency provides with the report, or has previously provided, a summary of the consumer's rights under this subchapter, as prescribed by the Federal Trade Commission under section 1681g(c)(3)[6] of this title.

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[6] See References in Text note below.

(2) Disclosure to consumer

(A) In general

Except as provided in subparagraph (B), a person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, unless—

(i) a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes; and

(ii) the consumer has authorized in writing (which authorization may be made on the document referred to in clause (i)) the procurement of the report by that person.

(B) Application by mail, telephone, computer, or other similar means

If a consumer described in subparagraph (C) applies for employment by mail, telephone, computer, or other similar means, at any time before a consumer report is procured or caused to be procured in connection with that application—

(i) the person who procures the consumer report on the consumer for employment purposes shall provide to the consumer, by oral, written, or electronic means, notice that a consumer report may be obtained for employment purposes, and a summary of the consumer's rights under section 1681m(a)(3) of this title; and

(ii) the consumer shall have consented, orally, in writing, or electronically to the procurement of the report by that person.

(C) Scope

Subparagraph (B) shall apply to a person procuring a consumer report on a consumer in connection with the consumer's application for employment only if—

(i) the consumer is applying for a position over which the Secretary of Transportation has the power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of title 49, or a position subject to safety regulation by a State transportation agency; and

(ii) as of the time at which the person procures the report or causes the report to be procured the only interaction between the consumer and the person in connection with that employment application has been by mail, telephone, computer, or other similar means.

(3) Conditions on use for adverse actions

(A) In general

Except as provided in subparagraph (B), in using a consumer report for employment purposes, before taking any adverse action based in whole or in part on the report, the person intending to take such adverse action shall provide to the consumer to whom the report relates—

(i) a copy of the report; and

(ii) a description in writing of the rights of the consumer under this subchapter, as prescribed by the Federal Trade Commission under section 1681g(c)(3)[7] of this title.

(B) Application by mail, telephone, computer, or other similar means

(i) If a consumer described in subparagraph (C) applies for employment by mail, telephone, computer, or other similar means, and if a person who has procured a consumer report on the consumer for employment purposes takes adverse action on the employment application based in whole or in part on the report, then the person must provide to the consumer to whom the report relates, in lieu of the notices required under subparagraph (A) of this section and under section 1681m(a) of this title, within 3 business days of taking such action, an oral, written or electronic notification—

(I) that adverse action has been taken based in whole or in part on a consumer report received from a consumer reporting agency;

(II) of the name, address and telephone number of the consumer reporting agency that furnished the consumer report (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis);

(III) that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide to the consumer the

[7] See References in Text note below.

specific reasons why the adverse action was taken; and

(IV) that the consumer may, upon providing proper identification, request a free copy of a report and may dispute with the consumer reporting agency the accuracy or completeness of any information in a report.

(ii) If, under clause (B)(i)(IV), the consumer requests a copy of a consumer report from the person who procured the report, then, within 3 business days of receiving the consumer's request, together with proper identification, the person must send or provide to the consumer a copy of a report and a copy of the consumer's rights as prescribed by the Federal Trade Commission under section 1681g(c)(3)[8] of this title.

(C) Scope

Subparagraph (B) shall apply to a person procuring a consumer report on a consumer in connection with the consumer's application for employment only if—

(i) the consumer is applying for a position over which the Secretary of Transportation has the power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of title 49, or a position subject to safety regulation by a State transportation agency; and

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[8] See References in Text note below.

(ii) as of the time at which the person procures the report or causes the report to be procured the only interaction between the consumer and the person in connection with that employment application has been by mail, telephone, computer, or other similar means.

(4) Exception for national security investigations

(A) In general

In the case of an agency or department of the United States Government which seeks to obtain and use a consumer report for employment purposes, paragraph (3) shall not apply to any adverse action by such agency or department which is based in part on such consumer report, if the head of such agency or department makes a written finding that—

(i) the consumer report is relevant to a national security investigation of such agency or department;

(ii) the investigation is within the jurisdiction of such agency or department;

(iii) there is reason to believe that compliance with paragraph (3) will—

(I) endanger the life or physical safety of any person;

(II) result in flight from prosecution;

(III) result in the destruction of, or tampering with, evidence relevant to the investigation;

(IV) result in the intimidation of a potential witness relevant to the investigation;

(V) result in the compromise of classified information; or

(VI) otherwise seriously jeopardize or unduly delay the investigation or another official proceeding.

(B) Notification of consumer upon conclusion of investigation

Upon the conclusion of a national security investigation described in subparagraph (A), or upon the determination that the exception under subparagraph (A) is no longer required for the reasons set forth in such subparagraph, the official exercising the authority in such subparagraph shall provide to the consumer who is the subject of the consumer report with regard to which such finding was made—

(i) a copy of such consumer report with any classified information redacted as necessary;

(ii) notice of any adverse action which is based, in part, on the consumer report; and

(iii) the identification with reasonable specificity of the nature of the investigation for which the consumer report was sought.

(C) Delegation by head of agency or department

For purposes of subparagraphs (A) and (B), the head of any agency or department of the United States Government may delegate his or her author-

ities under this paragraph to an official of such agency or department who has personnel security responsibilities and is a member of the Senior Executive Service or equivalent civilian or military rank.

(D) Definitions

For purposes of this paragraph, the following definitions shall apply:

(i) Classified information

The term "classified information" means information that is protected from unauthorized disclosure under Executive Order No. 12958 or successor orders.

(ii) National security investigation

The term "national security investigation" means any official inquiry by an agency or department of the United States Government to determine the eligibility of a consumer to receive access or continued access to classified information or to determine whether classified information has been lost or compromised.

(c) Furnishing reports in connection with credit or insurance transactions that are not initiated by the consumer

(1) In general

A consumer reporting agency may furnish a consumer report relating to any consumer pursuant to subparagraph (A) or (C) of sub-

section (a)(3) of this section in connection with any credit or insurance transaction that is not initiated by the consumer only if—

(A) the consumer authorizes the agency to provide such report to such person; or

(B)(i) the transaction consists of a firm offer of credit or insurance;

(ii) the consumer reporting agency has complied with subsection (e) of this section;

(iii) there is not in effect an election by the consumer, made in accordance with subsection (e) of this section, to have the consumer's name and address excluded from lists of names provided by the agency pursuant to this paragraph; and

(iv) the consumer report does not contain a date of birth that shows that the consumer has not attained the age of 21, or, if the date of birth on the consumer report shows that the consumer has not attained the age of 21, such consumer consents to the consumer reporting agency to such furnishing.

(2) Limits on information received under paragraph (1)(B)

A person may receive pursuant to paragraph (1)(B) only—

(A) the name and address of a consumer;

(B) an identifier that is not unique to the consumer and that is used by the person solely for the purpose of verifying the identity of the consumer; and

(C) other information pertaining to a consumer that does not identify the relationship or experience of the consumer with respect to a particular creditor or other entity.

(3) Information regarding inquiries

Except as provided in section 1681g(a)(5) of this title, a consumer reporting agency shall not furnish to any person a record of inquiries in connection with a credit or insurance transaction that is not initiated by a consumer.

(d) Reserved

(e) Election of consumer to be excluded from lists

(1) In general

A consumer may elect to have the consumer's name and address excluded from any list provided by a consumer reporting agency under subsection (c)(1)(B) of this section in connection with a credit or insurance transaction that is not initiated by the consumer, by notifying the agency in accordance with paragraph (2) that the consumer does not consent to any use of a consumer report relating to the consumer in connection with any credit or

insurance transaction that is not initiated by the consumer.

(2) Manner of notification

A consumer shall notify a consumer reporting agency under paragraph (1)—

(A) through the notification system maintained by the agency under paragraph (5); or

(B) by submitting to the agency a signed notice of election form issued by the agency for purposes of this subparagraph.

(3) Response of agency after notification through system

Upon receipt of notification of the election of a consumer under paragraph (1) through the notification system maintained by the agency under paragraph (5), a consumer reporting agency shall—

(A) inform the consumer that the election is effective only for the 5-year period following the election if the consumer does not submit to the agency a signed notice of election form issued by the agency for purposes of paragraph (2)(B); and

(B) provide to the consumer a notice of election form, if requested by the consumer, not later than 5 business days after receipt of the notification of the election through the system established under paragraph (5), in the case of a request made at

the time the consumer provides notification through the system.

(4) Effectiveness of election

An election of a consumer under paragraph (1)—

(A) shall be effective with respect to a consumer reporting agency beginning 5 business days after the date on which the consumer notifies the agency in accordance with paragraph (2);

(B) shall be effective with respect to a consumer reporting agency—

(i) subject to subparagraph (C), during the 5-year period beginning 5 business days after the date on which the consumer notifies the agency of the election, in the case of an election for which a consumer notifies the agency only in accordance with paragraph (2)(A); or

(ii) until the consumer notifies the agency under subparagraph (C), in the case of an election for which a consumer notifies the agency in accordance with paragraph (2)(B);

(C) shall not be effective after the date on which the consumer notifies the agency, through the notification system established by the agency under paragraph (5), that the election is no longer effective; and

(D) shall be effective with respect to each affiliate of the agency.

(5) Notification system

(A) In general

Each consumer reporting agency that, under subsection (c)(1)(B) of this section, furnishes a consumer report in connection with a credit or insurance transaction that is not initiated by a consumer, shall—

(i) establish and maintain a notification system, including a toll-free telephone number, which permits any consumer whose consumer report is maintained by the agency to notify the agency, with appropriate identification, of the consumer's election to have the consumer's name and address excluded from any such list of names and addresses provided by the agency for such a transaction; and

(ii) publish by not later than 365 days after September 30, 1996, and not less than annually thereafter, in a publication of general circulation in the area served by the agency—

(I) a notification that information in consumer files maintained by the agency may be used in connection with such transactions; and

(II) the address and toll-free telephone number for consumers to use to

notify the agency of the consumer's election under clause (i).

(B) Establishment and maintenance as compliance

Establishment and maintenance of a notification system (including a toll-free telephone number) and publication by a consumer reporting agency on the agency's own behalf and on behalf of any of its affiliates in accordance with this paragraph is deemed to be compliance with this paragraph by each of those affiliates.

(6) Notification system by agencies that operate nationwide

Each consumer reporting agency that compiles and maintains files on consumers on a nationwide basis shall establish and maintain a notification system for purposes of paragraph (5) jointly with other such consumer reporting agencies.

(f) Certain use or obtaining of information prohibited

A person shall not use or obtain a consumer report for any purpose unless—

(1) the consumer report is obtained for a purpose for which the consumer report is authorized to be furnished under this section; and

(2) the purpose is certified in accordance with section 1681e of this title by a prospec-

tive user of the report through a general or specific certification.

(g) Protection of medical information

(1) Limitation on consumer reporting agencies

A consumer reporting agency shall not furnish for employment purposes, or in connection with a credit or insurance transaction, a consumer report that contains medical information (other than medical contact information treated in the manner required under section 605(a)(6) of this title) about a consumer, unless—

(A) if furnished in connection with an insurance transaction, the consumer affirmatively consents to the furnishing of the report;

(B) if furnished for employment purposes or in connection with a credit transaction—

(i) the information to be furnished is relevant to process or effect the employment or credit transaction; and

(ii) the consumer provides specific written consent for the furnishing of the report that describes in clear and conspicuous language the use for which the information will be furnished; or

(C) the information to be furnished pertains solely to transactions, accounts, or

balances relating to debts arising from the receipt of medical services, products, or devises, where such information, other than account status or amounts, is restricted or reported using codes that do not identify, or do not provide information sufficient to infer, the specific provider or the nature of such services, products, or devices, as provided in section 1681c(a)(6) of this title.

(2) Limitation on creditors

Except as permitted pursuant to paragraph (3)(C) or regulations prescribed under paragraph (5)(A), a creditor shall not obtain or use medical information (other than medical information treated in the manner required under section 1681c(a)(6) of this title) pertaining to a consumer in connection with any determination of the consumer's eligibility, or continued eligibility, for credit.

(3) Actions authorized by Federal law, insurance activities and regulatory determinations

Section 1681a(d)(3) of this title shall not be construed so as to treat information or any communication of information as a consumer report if the information or communication is disclosed—

(A) in connection with the business of insurance or annuities, including the activities described in section 18B of the model Privacy of Consumer Financial and Health

Information Regulation issued by the National Association of Insurance Commissioners (as in effect on January 1, 2003);

(B) for any purpose permitted without authorization under the Standards for Individually Identifiable Health Information promulgated by the Department of Health and Human Services pursuant to the Health Insurance Portability and Accountability Act of 1996, or referred to under section 1179 of such Act,[9] or described in section 6802(e) of this title; or

(C) as otherwise determined to be necessary and appropriate, by regulation or order and subject to paragraph (6), by the Commission, any Federal banking agency or the National Credit Union Administration (with respect to any financial institution subject to the jurisdiction of such agency or Administration under paragraph (1), (2), or (3) of section 1681s(b) of this title,[10] or the applicable State insurance authority (with respect to any person engaged in providing insurance or annuities).

(4) Limitation on redisclosure of medical information

Any person that receives medical information pursuant to paragraph (1) or (3) shall not

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[9] See References in Text note below.

[10] So in original. A closing parenthesis probably should precede the comma.

disclose such information to any other person, except as necessary to carry out the purpose for which the information was initially disclosed, or as otherwise permitted by statute, regulation, or order.

(5) Regulations and effective date for paragraph (2)

(A) Regulations required

Each Federal banking agency and the National Credit Union Administration shall, subject to paragraph (6) and after notice and opportunity for comment, prescribe regulations that permit transactions under paragraph (2) that are determined to be necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs (and which shall include permitting actions necessary for administrative verification purposes), consistent with the intent of paragraph (2) to restrict the use of medical information for inappropriate purposes.

(B) Final regulations required

The Federal banking agencies and the National Credit Union Administration shall issue the regulations required under subparagraph (A) in final form before the end of the 6-month period beginning on the December 4, 2003.

(6) Coordination with other laws

No provision of this subsection shall be construed as altering, affecting, or superseding the applicability of any other provision of Federal law relating to medical confidentiality.

3. 15 U.S.C. 1681n (2006 & Supp. III 2009) provides:

Civil liability for willful noncompliance

(a) In general

Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000; or

(B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Civil liability for knowing noncompliance

Any person who obtains a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose shall be liable to the consumer reporting agency for actual damages sustained by the consumer reporting agency or $1,000, whichever is greater.

(c) Attorney's fees

Upon a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

(d) Clarification of willful noncompliance

For the purposes of this section, any person who printed an expiration date on any receipt provided to a consumer cardholder at a point of sale or transaction between December 4, 2004, and June 3, 2008, but otherwise complied with the requirements of section 1681c(g) of this title for such receipt shall not be in willful noncompliance with section 1681c(g) of this title by reason of printing such expiration date on the receipt.

4. 15 U.S.C. 1681*o* provides:

Civil liability for negligent noncompliance

(a) In general

Any person who is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1) any actual damages sustained by the consumer as a result of the failure; and

(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Attorney's fees

On a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

5. 15 U.S.C. 1681p provides:

Jurisdiction of courts; limitation of actions

An action to enforce any liability created under this subchapter may be brought in any appropriate United States district court, without regard to the amount in

controversy, or in any other court of competent jurisdiction, not later than the earlier of—

(1) 2 years after the date of discovery by the plaintiff of the violation that is the basis for such liability; or

(2) 5 years after the date on which the violation that is the basis for such liability occurs.

6. 15 U.S.C. 1681u provides:

Disclosures to FBI for counterintelligence purposes

(a) Identity of financial institutions

Notwithstanding section 1681b of this title or any other provision of this subchapter, a consumer reporting agency shall furnish to the Federal Bureau of Investigation the names and addresses of all financial institutions (as that term is defined in section 3401 of title 12) at which a consumer maintains or has maintained an account, to the extent that information is in the files of the agency, when presented with a written request for that information, signed by the Director of the Federal Bureau of Investigation, or the Director's designee in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge of a Bureau field office designated by the Director, which certifies compliance with this section. The Director or the Director's designee may make such a certification only if the Director or the Director's designee has determined in writing, that such information is sought for the conduct of an authorized investigation to protect against international terrorism or clandestine intelligence activ-

ities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States.

(b) Identifying information

Notwithstanding the provisions of section 1681b of this title or any other provision of this subchapter, a consumer reporting agency shall furnish identifying information respecting a consumer, limited to name, address, former addresses, places of employment, or former places of employment, to the Federal Bureau of Investigation when presented with a written request, signed by the Director or the Director's designee in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge of a Bureau field office designated by the Director, which certifies compliance with this subsection. The Director or the Director's designee may make such a certification only if the Director or the Director's designee has determined in writing that such information is sought for the conduct of an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States.

(c) Court order for disclosure of consumer reports

Notwithstanding section 1681b of this title or any other provision of this subchapter, if requested in writing by the Director of the Federal Bureau of Investigation, or a designee of the Director in a position not lower than Deputy Assistant Director at Bureau headquarters

or a Special Agent in Charge in a Bureau field office designated by the Director, a court may issue an order ex parte directing a consumer reporting agency to furnish a consumer report to the Federal Bureau of Investigation, upon a showing in camera that the consumer report is sought for the conduct of an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States. The terms of an order issued under this subsection shall not disclose that the order is issued for purposes of a counterintelligence investigation.

(d) Confidentiality

(1) If the Director of the Federal Bureau of Investigation, or his designee in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge in a Bureau field office designated by the Director, certifies that otherwise there may result a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person, no consumer reporting agency or officer, employee, or agent of a consumer reporting agency shall disclose to any person (other than those to whom such disclosure is necessary to comply with the request or an attorney to obtain legal advice or legal assistance with respect to the request) that the Federal Bureau of Investigation has sought or obtained the identity of financial institutions or a consumer report respecting any consumer under subsection (a), (b), or (c),

and no consumer reporting agency or officer, employee, or agent of a consumer reporting agency shall include in any consumer report any information that would indicate that the Federal Bureau of Investigation has sought or obtained such information on a consumer report.

(2) The request shall notify the person or entity to whom the request is directed of the nondisclosure requirement under paragraph (1).

(3) Any recipient disclosing to those persons necessary to comply with the request or to an attorney to obtain legal advice or legal assistance with respect to the request shall inform such persons of any applicable nondisclosure requirement. Any person who receives a disclosure under this subsection shall be subject to the same prohibitions on disclosure under paragraph (1).

(4) At the request of the Director of the Federal Bureau of Investigation or the designee of the Director, any person making or intending to make a disclosure under this section shall identify to the Director or such designee the person to whom such disclosure will be made or to whom such disclosure was made prior to the request, except that nothing in this section shall require a person to inform the Director or such designee of the identity of an attorney to whom disclosure was made or will be made to obtain legal advice or legal assistance with respect to the request for the identity of financial institutions or a consumer report respecting any consumer under this section.

(e) Payment of fees

The Federal Bureau of Investigation shall, subject to the availability of appropriations, pay to the consumer reporting agency assembling or providing report or information in accordance with procedures established under this section a fee for reimbursement for such costs as are reasonably necessary and which have been directly incurred in searching, reproducing, or transporting books, papers, records, or other data required or requested to be produced under this section.

(f) Limit on dissemination

The Federal Bureau of Investigation may not disseminate information obtained pursuant to this section outside of the Federal Bureau of Investigation, except to other Federal agencies as may be necessary for the approval or conduct of a foreign counterintelligence investigation, or, where the information concerns a person subject to the Uniform Code of Military Justice, to appropriate investigative authorities within the military department concerned as may be necessary for the conduct of a joint foreign counterintelligence investigation.

(g) Rules of construction

Nothing in this section shall be construed to prohibit information from being furnished by the Federal Bureau of Investigation pursuant to a subpoena or court order, in connection with a judicial or administrative proceeding to enforce the provisions of this subchapter. Nothing in this section shall be construed to authorize or permit the withholding of information from the Congress.

(h) Reports to Congress

(1) On a semiannual basis, the Attorney General shall fully inform the Permanent Select Committee on Intelligence and the Committee on Banking, Finance and Urban Affairs of the House of Representatives, and the Select Committee on Intelligence and the Committee on Banking, Housing, and Urban Affairs of the Senate concerning all requests made pursuant to subsections (a), (b), and (c) of this section.

(2) In the case of the semiannual reports required to be submitted under paragraph (1) to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate, the submittal dates for such reports shall be as provided in section 415b of title 50.

(i) Damages

Any agency or department of the United States obtaining or disclosing any consumer reports, records, or information contained therein in violation of this section is liable to the consumer to whom such consumer reports, records, or information relate in an amount equal to the sum of—

(1) $100, without regard to the volume of consumer reports, records, or information involved;

(2) any actual damages sustained by the consumer as a result of the disclosure;

(3) if the violation is found to have been willful or intentional, such punitive damages as a court may allow; and

(4) in the case of any successful action to enforce liability under this subsection, the costs of the action, together with reasonable attorney fees, as determined by the court.

(j) Disciplinary actions for violations

If a court determines that any agency or department of the United States has violated any provision of this section and the court finds that the circumstances surrounding the violation raise questions of whether or not an officer or employee of the agency or department acted willfully or intentionally with respect to the violation, the agency or department shall promptly initiate a proceeding to determine whether or not disciplinary action is warranted against the officer or employee who was responsible for the violation.

(k) Good-faith exception

Notwithstanding any other provision of this subchapter, any consumer reporting agency or agent or employee thereof making disclosure of consumer reports or identifying information pursuant to this subsection in good-faith reliance upon a certification of the Federal Bureau of Investigation pursuant to provisions of this section shall not be liable to any person for such disclosure under this subchapter, the constitution of any State, or any law or regulation of any State or any political subdivision of any State.

(*l*) Limitation of remedies

Notwithstanding any other provision of this subchapter, the remedies and sanctions set forth in this section shall be the only judicial remedies and sanctions for violation of this section.

(m) Injunctive relief

In addition to any other remedy contained in this section, injunctive relief shall be available to require compliance with the procedures of this section. In the event of any successful action under this subsection, costs together with reasonable attorney fees, as determined by the court, may be recovered.

7. 28 U.S.C. 1346 provides in pertinent part:

United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

* * * * *

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contracts Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges,

or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

* * * * *

8. 28 U.S.C. 1491 provides in pertinent part:

Claims against United States generally; action involving Tennessee Valley Authority

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

* * * * *

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 08-CV-7409

JAMES X. BORMES, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

Filed: Dec. 30, 2008

CLASS ACTION COMPLAINT

Plaintiff James X. Bormes, on behalf of himself and all others similarly situated, brings this class action against Defendant the United States of America, and alleges as follows upon personal knowledge as to himself and his own acts and experiences, and, as to all other matters, upon information and belief, including investigation conducted by his attorneys:

NATURE OF THE CASE

1. In 2003, Congress passed, and the President signed, the Fair and Accurate Credit Transaction Act, P.L. 108-159 ("FACTA"), which amended the federal Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq*.

("FCRA"). FACTA was intended to help consumers fight the growing crimes of identity theft and credit and debit card fraud.

2. FACTA provides, *inter alia*, that:

> Except as otherwise provided in this subsection, no person that accepts credit cards or debit cards for the transaction of business shall print more than the last five digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of sale or transaction. 15 U.S.C. § 1681c(g)

3. Despite knowing and being repeatedly informed about FACTA's credit and debit card truncation requirements, and despite having had more than five years to comply with the law, the United States of America (the "Government"), through one or more of its agencies, willfully violated 15 U.S.C. § 1681c(g) by printing expiration dates on credit or debit card receipts provided to cardholders, subjecting consumers to an increased risk of identity theft and credit and debit card fraud.

4. Plaintiff brings this action on behalf of himself and all others similarly situated and seeks statutory damages, costs and attorneys' fees.

JURISDICTION

5. This Court has jurisdiction over this action pursuant to 28 U.S.C. §1331, 15 U.S.C. § 1681p and 28 U.S.C. § 1346(a)(2) (the "Little Tucker Act").

6. The Little Tucker Act, provides, in relevant part, as follows:

> The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:
>
> * * *
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

7. Plaintiff's claim against the Government is founded upon the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. 1681 *et seq*. The FCRA is a money-mandating statute and can fairly be interpreted as mandating compensation by the Government for damages sustained and/or creating a substantive cause of action and/or right to recover money damages.

8. 15 U.S.C. § 1681n of the FCRA provides that:

> Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—
>
> (1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000 . . .
>
> (2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

9. 15 U.S.C. § 1681a(a) defines the term "person" to include the government and governmental subdivisions or agencies:

The term "person" means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

10. 15 U.S.C. § 1681p further provides that:

An action to enforce any liability created under this subchapter may be brought in any appropriate United States district court, without regard to the amount in controversy, or in any other court of competent jurisdiction.

11. The aforementioned statutes constitute an express waiver of the sovereign immunity of the United States of America.

VENUE

12. Venue is proper in this District pursuant to 28 U.S.C. § 1391, 28 U.S.C. § 1402 and 15 U.S.C. §1681p.

PARTIES

13. Plaintiff, James X. Bormes ("Bormes"), is and at all times relevant hereto was a resident of Cook County, Illinois. Plaintiff is an attorney and principal in the Law Office Of James X. Bormes, P.C., located at 8 South Michigan Avenue, Suite 2600, Chicago, Illinois.

14. Defendant is the United States of America (the "Government"), a sovereign entity and body politic and is responsible for the actions of its various agencies, including those listed in paragraph 16 hereof.

FACTS RELATING TO THE GOVERNMENT'S PAY.GOV SYSTEM

15. In October 2000, the Government, through the United States Department of the Treasury's Financial Management Service ("FMS"), launched Pay.gov, a web-based billing, collection and payment processing application that allows consumers to make online payments to various government agencies by credit or debit card.

16. Numerous agencies of the Government utilize the Pay.gov system to process online credit and debit card payment transactions, including the following:

- Department of Agriculture
- Department of Commerce
- Department of Defense
- Department of Education
- Department of Energy
- Department of Health and Human Services
- Department of Homeland Security
- Department of Housing and Urban Development
- Department of Justice
- Department of Labor
- Department of State
- Department of the Interior
- Department of the Treasury
- Department of Transportation
- Department of Veterans Affairs
- Environmental Protection Agency
- US District Courts

- US Bankruptcy Courts
- Corporation for National & Community Service
- Export/Import Bank
- Federal Communications Commission
- Federal Mediation Conciliation Service
- Federal Trade Commission
- General Services Administration
- Government Printing Office
- Library of Congress
- National Aeronautics and Space Administration
- National Archives and Records Administration
- National Credit Union Administration
- National Endowment for the Arts
- National Labor Relations Board
- National Park Foundation
- National Transportation Safety Board
- Nuclear Regulatory Commission
- Office of Personnel Management
- Peace Corps
- Railroad Retirement Board (RRB)
- Small Business Administration
- Social Security Administration
- Stennis Center for Public Service
- Tennessee Valley Authority

FACTS RELATING TO THE NAMED PLAINTIFF

17. On or about August 9, 2008, Plaintiff, on behalf of one of his clients, filed a lawsuit in the United States District Court for the Northern District of Illinois using its online CM/ECF document filing system. Plaintiff was required to pay $350 in filing fees.

18. Plaintiff paid the filing fees using his American Express credit card, which transaction was processed through the Government's Pay.gov system.

19. After submitting his payment, the Government provided Plaintiff an electronically printed receipt at the point of sale or transaction in the form of a confirmation webpage that was displayed on his computer screen. The Government also instructed Plaintiff to print copies of the confirmation screen receipt for his records, which Plaintiff did.

20. The Government further provided a copy of the electronically printed receipt to Plaintiff by emailing a copy to Plaintiff's email address.

21. The electronically printed receipt contained the last four digits of Plaintiff's credit card number, Plaintiff's credit card's expiration date, Plaintiff's name, Plaintiff's address, and the type of card Plaintiff used in the transaction.

FACTS RELATING TO THE IMPORTANCE OF TRUNCATING EXPIRATION DATES

22. The printing of expiration dates on customer receipts increases the possibility of both identity theft and credit card and debit card fraud.

23. Expiration dates are widely recognized by payment processors, merchants and others as an important security feature and are routinely used to validate and authenticate credit and debit card purchases. Unlike the account number on the credit or debit card, the expiration date cannot be deciphered through sophisticated mathematical modeling. Therefore, the expiration date is an important security check that (a) corroborates that a person attempting to use a given account number is actually the authorized user of the card and (b) the person making a purchase over the phone or online actually has the card in his or her possession.

24. Another widely recognized and routinely used security feature used to validate and authenticate credit or debit card transactions is the 3- or 4-digit Card Security Code ("CSC") or Card Verification Value or Code ("CVV," "CVV2" or "CVC") located on the back (or front, in the case of American Express) of most credit and/or debit cards.

25. One of the inputs used to calculate CSC, CVC and CVV security codes is the credit or debit card's expiration date. The printing of expiration dates on customer receipts increases the likelihood that a thief will be able to calculate a CSC or CVV security code and thereby bypass this additional security check.

26. In addition, expiration dates are often used by thieves to bolster their credibility when they attempt to dupe cardholders and others into disclosing other confidential financial information relating to the cardholder (i.e., by making pretext calls, by sending phishing emails, etc.). The more information that is disclosed on a receipt, the easier it is to pilfer additional confidential financial information.

27. Expiration dates are also one of the items contained in the magnetic strip of a credit card; having it is vital to a thief's ability to create a phony duplicate credit or debit card.

FACTS RELATING TO THE GOVERNMENT'S WILLFUL NONCOMPLIANCE WITH FACTA'S TRUNCATION REQUIREMENTS

28. Persons that accept credit and/or debit cards were given up to three years from the date FACTA was enacted to comply with its requirements (i.e., until December 4, 2006) with respect to devices in use prior to

January 1, 2005 and up to two years with respect to devices first put into use on or after January 1, 2005 (i.e., no later than January 1, 2005).

29. The Government knew of and was informed about the law requiring the truncation of credit and debit card numbers and prohibiting the printing of expiration dates on credit and debit card receipts. Indeed, the Government, through Congress and the President, enacted the law in 2003 and later amended it in 2007 via the Credit and Debit Card Receipt Clarification Act of 2007, H.R. 4008, clarifying that any person who provides a credit or debit card receipt on or after June 4, 2008 that includes a credit or debit card's expiration date in willful noncompliance of the statute will be subject to both statutory and punitive damages.

30. The FCRA and its truncation requirements have been widely discussed in the public domain among merchants, the government and the public at large, through media, trade associations, governmental agencies, banks, card issuers, and payment processors.

31. For instance, the Government, through the Federal Trade Commission ("FTC"), which has the authority to administratively enforce compliance with the FCRA and issue commentaries on the statute, twice provided notice in 2007 reminding the public of the requirement to truncate credit and debit card information on receipts.

32. On information and belief, VISA, MasterCard, and the PCI Security Standards Council—a consortium founded by VISA, MasterCard, Discover, American Express and JCB—and other companies that sell equipment and software for the processing of credit or debit card payments, and other entities, repeatedly informed

its customers, including the Government, about FACTA's truncation requirements, including its prohibition on the printing of more than the last five digits of card numbers or expiration dates on receipts.

33. On information and belief, Government agencies participating in the Pay.gov credit and debit card processing system, including the United States District Court for the Northern District of Illinois, were required to, and did, enter into Agency Participation Agreements ("APA") with the United States Department of the Treasury, Financial Management Service ("FMS") and agreed to be bound by FMS Card Processing Rules and Regulations, which require Government agencies to comply with, and be bound by, federal law and VISA, MasterCard, American Express and Discover Card rules and regulations, by-laws and policies:

> The Agency must comply with and be bound by the VISA, MasterCard, American Express and Discover Card Rules and Regulations ("Card Rules"). * * * The Agency also must comply with and be bound by the Visa U.S.A Inc. By-Laws and Operating Regulations, the Visa International Operating Regulations and any other rules, policies or requirements of Visa or any of its subsidiaries or affiliates (collectively "Visa Rules"), the MasterCard International Inc. By-Laws and Operating Regulations and any other rules, policies or requirements of MasterCard or any of its subsidiaries or affiliates (collectively "MasterCard Rules"), and the American Express Card Acceptance Operating Rules for the Federal Government, any of which may be altered or amended from time to time and without notice. The Agency agrees to follow and be bound by the rules and regulations

> of the aforementioned networks, as amended from time to time, to the extent that these rules and regulations do not conflict with federal law and/or the terms of the FMS Card Processing Rules and Regulations. In the event of a conflict, federal law and/or the terms of the FMS Card Processing Rules and Regulations shall govern.

FMS Card Processing Rules and Regulations at 1.

34. On information and belief, VISA, MasterCard, American Express and Discover Card rules and regulations, by-laws and/or policies also require customers to comply with federal law, including, specifically FACTA's truncation requirements.

35. State laws passed or introduced in at least thirty-four states, require that card numbers and expiration dates be excluded from printed credit and debit card receipts.

36. On information and belief, a substantial number of merchants and entities readily brought their credit card and debit card receipt processing equipment and software into compliance with FACTA. The Government could have done the same without difficulty.

37. On information and belief, it would have been a simple task for the Government to either reprogram its machines and software to not violate FACTA or purchase new machines and software that did not violate FACTA.

CLASS ACTION ALLEGATIONS

38. Plaintiff brings this action pursuant to Rule 23 of the Federal Rules of Civil Procedure ("FRCP") on behalf of himself and the following class (the "Class"):

> All individual cardholders who, on or after June 4, 2008, were provided an electronically printed receipt from the United States of America, or one of its agencies, wherein the receipt displayed more than the last five digits of the cardholders' credit card or debit card number and/or the expiration date of the card.

39. The Class consist of thousands of individuals and other entities, making joinder impractical, in satisfaction of FRCP 23(a)(1). The exact size of the Class and the identities of the individual members thereof are ascertainable through the Government's records, including but not limited to the Government's sales and transaction records.

40. The claims of Plaintiff are typical of the claims of the Class. The claims of the Plaintiff and the Class are based on the same legal theories and arise from the same unlawful and willful conduct, resulting in the same injury to the Plaintiff and the Class.

41. Plaintiff and the Class were customers of the Government, each having transacted business with the Government using a credit card and/or debit card. At the point of such sale or transaction with Plaintiff and the Class, the Government provided to Plaintiff and each member of the Class a receipt in violation of 15 U.S.C. § 1681c(g).

42. The Class has a well-defined community of interest. The Government has acted and failed to act on grounds generally applicable to the Plaintiff and the Class, requiring the Court's imposition of uniform relief to ensure compatible standards of conduct toward the Class.

43. There are many questions of law and fact common to the claims of Plaintiff and the Class, and those questions predominate over any questions that may affect only individual Class members within the meaning of FRCP 23(a)(2) and 23(b)(2).

44. Common questions of fact and law affecting members of the Class include, but are not limited to, the following:

a. Whether the Government's conduct of providing Plaintiff and the Class with a sales or transaction receipt whereon the Government printed more than the last five digits of the credit card or debit card number and/or the expiration date of the card violated the FACTA, 15 U.S.C. §§ 1681 *et seq.*;

b. Whether the Government's conduct was willful; and

c. Whether Plaintiff and members of the Class are entitled to statutory damages, costs and/or attorney's fees for the Government's acts and conduct;

45. Absent a class action, most class members would find the cost of litigating their claims to be prohibitive, and will have no effective remedy. The class treatment of common questions of law and fact is also superior to multiple individual actions or piecemeal litigation in that it conserves the resources of the courts and the litigants, and promotes consistency and efficiency of adjudication.

46. Plaintiff will fairly and adequately represent and protect the interests of the Class. Plaintiff has retained counsel with substantial experience in prosecuting complex litigation and class actions. Plaintiff and his counsel are committed to vigorously prosecuting this action

on behalf of the other Class members, and have the financial resources to do so. Neither Plaintiff nor his counsel has any interest adverse to those of the other Class members.

COUNT I
(Violation of 15 U.S.C. § 1681 *et seq.*)

47. Plaintiff incorporates the foregoing allegations.

48. Title 15 U.S.C. § 1681c(g) provides, in relevant part, as follows:

> (1) *In general.* Except as otherwise provided in this subsection, no person that accepts credit cards or debit cards for the transaction of business shall print more than the last five digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of sale or transaction.
>
> (2) *Limitation.* This subsection shall apply only to receipts that are electronically printed, and shall not apply to transactions in which the sole means of recording a credit card or debit card account number is by handwriting or by an imprint or copy of the card

49. Title 15 U.S.C. § 1681n, entitled "Civil liability for willful noncompliance," in turn, provides, in relevant part, as follows:

> (a) *In general.* Any person who willfully fails to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer in an amount equal to the sum of (1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000;

* * *

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

50. The Government is a "person" within the meaning of 15 U.S.C. § 1681n.

51. Plaintiff and the Class are "consumers" within the meaning of 15 U.S.C. § 1681n and "cardholders" within the meaning of 15 U.S.C. § 1681c(g).

52. The Government transacts business in the United States and accepts credit cards and/or debit cards in the course of transacting such business.

53. The Government provided Plaintiff and the Class with one or more electronically printed receipts at the point of sale or transaction on which the Government printed more than the last five digits of Plaintiff's and the Class' credit or debit card number and/or expiration date.

54. Despite knowing and being repeatedly informed about FACTA and the importance on truncating credit card and debit card numbers and preventing the printing of expiration dates on receipts, and despite having had up to more than five years to comply with FACTA's requirements, the Government willfully violated and continues to violate FACTA's requirements by, *inter alia*, printing more than five digits of the card number

and/or the expiration date upon the receipts provided to Plaintiff and members of the Class.

55. The Government willfully violated FACTA in conscious disregard of the rights of Plaintiff and the members of the Class thereby exposing Plaintiff and the members of the Class to an increased risk of identity theft and credit and/or debit card fraud.

56. As a result of the Government's willful violations of FACTA, the Government is liable to Plaintiff and each member of the Class in the statutory damage amount of "not less than $100 and not more than $1000' for each violation." 15 U.S.C. § 1681n(a)(1)(A).

57. The Government conduct is continuing and, unless restrained, the Government will continue to engage in its willful conduct and consumers will continue to be at an increased risk of identity theft and credit and/or debit card fraud.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of himself and the Class, prays for the following relief:

a. An order certifying the Class and appointing Plaintiff as the representative of the Class, and appointing counsel for Plaintiff as lead counsel for the Class;

b. A judgment for and award of statutory damages to Plaintiff and the the [sic] Class pursuant to 15 U.S.C. § 1681n(a)(1)(A) for the Government's willful violations;

c. Payment of costs of suit herein incurred pursuant to, *inter alia*, 15 U.S.C. § 1681n(a)(3);

d. Payment of reasonable attorneys' fees pursuant to, *inter alia*, 15 U.S.C. § 1681n(a)(3); and

e. For such other and further relief as the Court may deem proper.

Dated: Dec. 30, 2008

JAMES X. BORMES, on his own behalf and on behalf of all others similarly situated,
By:
/s/ John G. Jacobs
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